CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. 535

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

PETITION FOR CERTIORARI FILED DECEMBER 5, 19[illegible]

CERTIORARI GRANTED JANUARY 4, 19[illegible]

(37,[illegible])

(37,235)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 538

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, PETITIONER,

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 19, 1933

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IN UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Customs Appeal No. 3441

Port of Chicago

Protests 235023-G-75281, 266238-G-75804, 266239-G-75825, 301714-G-76471

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Plaintiff,

vs.

THE UNITED STATES, Defendant

(Decided March 30, 1931)

PETITION FOR REVIEW—Filed April 20, 1931

To the United States Court of Customs and Patent Appeals, Washington, D. C.:

Application is hereby made, in the above entitled matter, to the honorable United States Court of Customs and Patent Appeals, for a review of the decision of the United States Customs Court in the above entitled matter, made on the thirtieth day of March, 1931, and filed by said United States Customs Court, Third Division thereof, on said day under the above described title, the Calendar and Protest numbers being 235023-G-75281, 266238-G-75804, 266239-G-75825, and 301714-G-76471. Such application is made because of errors of law and of fact committed by the said United States Customs Court, and complained of by the plaintiff therein, and applicant herein, the Board of Trustees of the University of Illinois, a copy of the errors of fact and of law complained of is in duplicate attached hereto and made a part hereof.

[fol. 2] A copy of the attached specifications or statement of errors of law and of fact was served on the Collector at the Port of Chicago, and on Charles D. Lawrence, Assistant Attorney General of the United States, in charge of cus-

toms, by mailing a copy in a sealed envelope correctly addressed with sufficient postage thereon, to the Collector at the Port of Chicago, at Chicago Illinois, and to the said Charles D. Lawrence in an envelope correctly addressed to him at 201 Varick Street, New York, New York, with sufficient postage thereon, on the eighteenth day of March, 1931. The undersigned counsel for the plaintiff made the service aforesaid himself and personally dropped the envelope aforesaid thus properly addressed and duly stamped into the United States post office at Champaign, State of Illinois, on the date and day last above mentioned.

Dated this eighteenth day of April 1931.

Board of Trustees of the University of Illinois, by H. S. Cunningham, Secretary. Sveinbjorn Johnson, Attorney for Plaintiff. (Seal University of Illinois, Chartered 1867.)

In U. S. Customs Court, Third Division

Port of Chicago

Protests 235023-G-75281, 266238-G-75804, 266239-G-75825, 301714-G-76471

[Title Omitted]

Assignment of Errors—Filed April 20, 1931

A. Errors of Fact:

1. The Court erred in finding as a fact that the University was organized under a "Special Law."

[fol. 3] 2. The Court erred in finding as a fact that the University is not an instrumentality of the State of Illinois of a strictly governmental character.

3. The Court erred in finding as a fact that the University is not a governmental character.

4. The Court erred in finding as a fact that the imposition, collection and payment of the tariff tax or duty against which the protests are made, would not destroy or embar-

rass the University of Illinois; and that the University can "get along without importing" the equipment against which the tariff tax was imposed.

B. Errors of Law:

1. The Court erred in concluding as a matter of law that the University of Illinois is not a public agency of the State of Illinois of a strictly governmental character and therefore entitled to exemption from the payment of duties upon the articles imported.

2. The Court erred in concluding as a matter of law that the activity, when carried on by the State and at public expense, of conducting a school offering work of college grade is of a purely proprietary character and that the State of Illinois, in conducting a University through the instrumentality of a public corporation created for that purpose is not engaged in performing a strictly governmental function.

3. The Court erred in concluding as a matter of law that the imposition, collection and payment of the tariff tax or duty against which the protests are made, would not destroy or embarrass the University of Illinois; and that the University can "get along without importing" the equipment against which the tariff tax was imposed.

4. The Court erred in concluding as a matter of law that the plaintiff was not entitled to exemption upon the payment of the duties protested upon any of the following grounds:

a. Because the machinery in question is the property of the State of Illinois and, therefore, the Federal Government has no right to impose an import duty upon the same.

[fol. 4] b. Because the import duty or tax is illegally and wrongfully assessed, and embarrasses the State of Illinois in performing a governmental function.

c. Because the equipment in question is the property of the State of Illinois and necessary to carry on its educational and governmental functions and operations.

d. Because the equipment is to be used at the University of Illinois, which is an agency of the State and supported by State taxes, and the imposition of an import duty or tax

against the University is equivalent to the imposition of an import duty or tax against the State and is illegal and wrongful, and in violation of the Constitution of the United States.

Respectfully submitted.

Sveinbjorn Johnson, Attorney for the Plaintiff and Appellant.

[File endorsement omitted.]

IN COURT OF CUSTOMS AND PATENT APPEALS

Protests 235023-G/75281, 266238-G/75804, 266239-G/75825, 301714-G/76471

[Title omitted]

STIPULATION AS TO PRINTING CERTAIN EXHIBITS—Filed Aug. 24, 1931

It is stipulated and agreed by and between the parties to the above entitled matter and their respective counsel that no part of Exhibits 2, 3, 4 and 5 in Protest 193436-G need be printed as a part of the record on appeal except the portions which appear on Exhibit A hereto attached and made a part of this stipulation. It is agreed that Exhibit 2, aforesaid is [fol. 5] the Bulletin of the University of Illinois, otherwise known as the Annual Register for the Year 1925-1926, containing descriptions of courses, names of the educational staff, names and addresses of students, and the like; that Exhibit 3 above refered to is the Report of the Comptroller of the University of Illinois to the Board of Trustees for the year ending June 30, 1926, exhibiting the financial condition of the University, showing receipts and disbursements; that Exhibit 4 above referred to is the Report of the Auditor of Public Accounts of the State of Illinois for the Year 1926, being the Biennial Report for the biennium beginning July 1, 1924, and ending June 30, 1926, duly transmitted to the Governor of the State of Illinois as required by law and containing, among other things, a statement of all property, real and personal, owned by the State of Illinois; that Exhibit 5 is the Fifth State Budget of the State of Illinois for the year 1927, listing among other things the requests for appropriations from the public

offices and public departments of the State of Illinois, including the University of Illinois, on page 267 thereof.

It is further agreed that the statutes creating the University of Illinois, locating the same, reorganizing it, and changing its name, shall be printed as a part of the record, all of which are attached hereto and marked for identification as a part of this stipulation as Exhibit B.

It is further stipulated and agreed by and between the parties herein that the within stipulation is subject nevertheless to all objections made by Government counsel of the trial of the instant case as to said exhibits, and that the Government does not waive any objection or objections made to any of said exhibits or the testimony relative thereto, and reserves in full all its rights respecting said objections to exhibits and testimony relating thereto.

Dated this 8 day of June, 1931.

Charles D. Lawrence, Assistant Attorney General of the United States. Sveinbjorn Johnson, Attorney for the Importer and Legal Counsel for the University of Illinois.

[File endorsement omitted.]

[fol. 6] EXHIBIT A TO STIPULATION

Protests 235023-G/75281, 266238-G/75804, 266239-G/75825, 301714-G/76471

Customs Appeal No. 3441

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Appellant,

vs.

THE UNITED STATES, Appellee

From Exhibit 2, Protest 193426-G. University of Illinois Bulletin, Annual Register, 1925-1926 (at Page 41).

"History

"The University was incorporated by an act of the General Assembly, February 28, 1867, as the Illinois Industrial University. This action was taken following the act of Congress known as the 'Morrill Land Grant,' whereby the national government gave each state in the Union public

land scrip equal to 30,000 acres for each senator and representative in Congress, 'for the endowment, support, and maintenance of at least one college whose leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts. * * * in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life.'

"The institution was placed under the control of a Board of Trustees, consisting of the Governor, the Superintendent of Public Instruction, and the President of the State Board of Agriculture, members ex officio, and twenty-eight citizens appointed by the Governor. The chief executive officer was called the Regent, and was made ex officio a member of the Board and presiding officer of both the Board of Trustees and the faculty. In 1873 the number of members was reduced to eleven—the Governor and the President of the State Board of Agriculture, ex officio, and nine others, who were still appointed by the Governor. [fol. 7] Since this time also, the President of the Board has been chosen by the members from among their own number for a term of one year. In 1887, a law was passed making membership in the Board elective at a general State election and restoring the Superintendent of Public Instruction as a member ex officio. There were then, therefore, three ex officio and nine elective members. In 1917, the General Assembly passed a law reorganizing the administration of the State. By virtue of this law, on January 1, 1919, the office of the President of the State Board of Agriculture was abolished. There are now, therefore, eleven members, two ex officio and nine elective.

"In 1885, the General Assembly changed the name of the institution from the Illinois Industrial University to the University of Illinois."

From Exhibit 2, Protest 193436-G (at Page 81)

"Beneficiary Aid

"(For more detailed information apply to the Dean of Men.)

"The following loan funds have been established for the benefit of worthy students who are in need of financial aid in order to finish their courses in the University.

"Edward Snyder Department of Students' Aid; Class of 1895 Fund; Graduate Club Loan Fund; Woman's League Loan Fund; William B. McKinley Loan Fund; Henry Strong Loan Fund; Margaret Lange James Loan Fund; Woman's Pharmacy Loan Fund (available for men as well as women); Library School Fund (administered by the Library School Alumni Association); First Fund for Overseas Soldiers; Dora E. Biddle Loan Fund; James R. Morris Loan Fund; Grace Darling Memorial Loan Fund; Student Loan Fund (Anonymous); Carter-Pennell Trust; Henry Roberts Temple Loan Fund."

(At Page 103)

"McKinley Professorship in the Economics of Public Utilities

"The Honorable William B. McKinley, United States Senator from Illinois, has endowed a professorship in the [fol. 8] Economics of Public Utilities (including transportation), in the College of Commerce and Business Administration."

From Exhibit 3, Protest 193436-G. University of Illinois, Report of the Comptroller for the Year Ending June 30, 1926 (Page 13)

"Budget Income, 1925–26

From State Appropriations for Operation:		
Salaries and Wages	$3,050,000.00	
Travel	40,000.00	
Equipment	290,000.00	
Office Expense	140,000.00	
Operation	460,000.00	
Repairs	150,000.00	
Improvements	120,000.00	
Sub-total		$4,250,000.00
For Buildings (1):		
Architecture Building	4,202.81	
Armory Addition	15,911.32	
New Gymnasium Addition	130,839.76	
New Library Addition	145,307.15	
Pharmacy Building Addition	25,629.99	
Sub-total		321,891.03
For Special Purposes:		
Cook County Experiment Station (2)		10,898.05
Total State appropriations		$4,582,789.08"

EXHIBIT 3, PROTEST 193436-G

Report of the Comptroller June 30, 1926

Transactions of Trust and Special Funds

Summary

Class of funds	Permanent		
	Amount of principal July 1, 1925	Net addition or deduction	Amount of principal June 30, 1926
Educational Endowments	$110,000.00	.....	$110,000.00
Student Loan Endowments	94,314.06	$29,561.97	123,876.03
Scholarship, Fellowship and Prize Endowments	64,691.48	1,531.72	66,223.20
Special Endowments	56,550.00	27,000.00	83,550.00
Building and Improvement Funds	.....	.....	.....
Research Donations	.....	.....	.....
Scholarship, Fellowship and Prize Donations	.....	.....	.....
Other Expendable Funds	.....	.....	.....
Deposit Funds	.....	.....	.....
Total	(325,555.54)	(58,093.69)	(383,649.23)
University Organizations' Funds (2)	.....	.....	.....
Grand Total	$325,555.54	$58,093.69	$383,649.23

(1) For Detailed Investments, see pages 52–55.
(2) Handled for accommodation.

[fol. 10]

Transactions of Trust and Special Funds

Detailed

Educational Endowments:			
W. B. McKinley Public Utility Economics Fund	$100,000.00	.....	$100,000.00
Adolph Gehrmann Lectureship in Medicine	10,000.00	.....	10,000.00
Total, Educational Endowments	(110,000.00)	.....	(110,000.00)
Student Loan Endowments:			
Anonymous Students' Loan Fund:			
Principal (Not Loanable)	30,000.00	.....	30,000.00
Income (Loanable)	4,116.88	$2,307.02	6,423.90
Carter-Pennell Loan Fund	509.13	275.16	784.29
Class of 1895 Students' Loan Fund	228.78	5.33	234.11
Darling Memorial Loan Fund	109.51	3.23	112.74
Dora E. Biddle Loan Fund	2,431.87	108.52	2,540.39
Graduate Students' Loan Fund	128.10	3.39	131.49
Margaret Lange James Students' Loan Fund	5,690.20	150.00	5,840.20
Marcus Russell Student Loan Endowment (Not Loanable)	.....	25,000.00	25,000.00
W. B. McKinley Students' Loan Fund	21,584.29	1,043.01	22,627.30
James R. Morris Students' Loan Fund	11,177.98	561.72	11,739.70
Overseas Loan Fund	2,021.54	23.58	2,045.12
[fol. 11]			
School of Pharmacy Loan Fund for Women Students	615.34	31.39	646.73
Edward Snyder Department of Students' Aid	12,636.25	.....	12,636.25

Funds	Permanent		
	Amount of principal July 1, 1925	Net addition or deduction	Amount of principal June 30, 1926
Henry Roberts Temple Loan Fund	1,023.59	43.47	1,067.06
Woman's League Students' Loan Fund	2,040.60	6.15	2,046.75
Total, Student Loan Endowments	(94,314.06)	(29,561.97)	(123,876.03)
Scholarship, Fellowship and Prize Endowments:			
Ira O. Baker Prize Fund	2,300.00	.....	2,300.00
Thrift Committee Economics Prize Fund	1,255.99	.72	1,256.71
Emily W. L. Schofield M. E. Missionary Scholarship in the College of Medicine	.....	.....	.....
English Poetry Prize Fund	641.00	.....	641.00
Francis J. Plym Fellowships and Prizes in Architecture	38,651.69	.....	38,651.69
John M. and Louisa C. Gregory Scholarship Fund	6,175.80	1,531.00	7,706.80
Robert F. Carr Fellowship in Chemistry	10,000.00	.....	10,000.00
Robert Laughlin Rea Scholarships in the College of Medicine	4,800.00	.....	4,800.00
William Jennings Bryan Prize Fund for Students' Essays on Government	255.00	.....	255.00
Thatcher Howland Guild Memorial Prize Fund for Students' Poems and One-act Plays	612.00	.....	612.00
Total, Scholarship, Fellowship and Prize Endowments	(64,691.48)	(1,531.72)	(66,223.20)

From Ex. 3—Protest 193436-G

[fol. 12] From Exhibit 4, Protest 193436-G. Biennial Report of the Auditor of Public Accounts of the State of Illinois

For the Biennium Beginning July 1, 1924 and Ending June 30, 1926

"Statement No. 38 (Page 202)

"Statement of the inventory of State property compiled from reports furnished to the Auditor of Public Accounts by the various offices, departments and institutions, for the years 1924 and 1925

* * * * * * *

(At Page 212)

"University of Illinois

	1924	1925
Lands and lots	$1,173,025.18	$1,294,434.45
Improvements—Buildings	7,606,101.52	10,961,439.09
Improvements—Other than buildings	311,265.53	470,572.56
Personal property	3,963,234.70	4,387,871.13
	$13,053,626.93	$17,114,317.23
Grand total	$73,120,694.94	$81,653,094.19"

From Exhibit 5, Protest 193436-G. Illinois Fifth State Budget, 1927 (Page 3)

"Letter of Transmittal

"To the members of the Fifty-fifth General Assembly:

* * * * * * *

"As required by law, I am transmitting in this Budget the estimates of receipts and expenditures received by the Director of Finance from the elective officers in the executive and judicial departments and from the University of Illinois.

"Respectfully submitted.

"Len. Small" (Governor).

[fol. 13] From Exhibit 5, Protest 193436-G. Illinois Fifth State Budget, 1927 (Page 267)

"University of Illinois

Description	Appropriation for biennium beginning July 1, 1925	Expenditures year beginning July 1, 1925	Estimates as approved		Memo
			Year beginning July 1, 1927	Year beginning July 1, 1928	
Salaries and Wages	$6,100,000	$3,050,000	$3,275,000	$3,275,000	.....
Office Expenses	280,000	140,000	140,000	140,000	.....
Travel	80,000	38,092	40,000	40,000	.....
Operation	920,000	427,043	465,000	465,000	.....
Repairs	300,000	148,818	160,000	160,000	.....
Equipment	580,000	290,000	290,000	290,000	.....
Permanent Improvements other than new buildings	240,000	120,000	130,000	130,000	.....
New buildings	2,000,000	321,891	750,000	750,000	.....
Temporary Kitchen—Chicago (at Research and Educational Hospital)	5,000	3,662	.....	.....	.....
Agricultural Experiment Station (Cook County)	30,000	.....	.....	.....	.....
Subtotal	$10,535,000	$4,539,506	$5,250,000	$5,250,000	.....
Interest on Endowment Fund	65,000	32,450	32,500	32,500	.....
Appropriation of receipts from U. S. Morrill and Nelson Acts	100,000	50,000	50,000	50,000	.....
Total	$10,700,000	$4,621,956	$5,332,500	$5,332,500	.....

[fols. 14-30]

Revenue

	Receipts year beginning July 1				
	1924 actual	1925 actual	1926 estimated	1927 estimated	1928 estimated*
From U. S. Government Aid to Colleges (all other cash receipts of the University go directly to the University Treasurer)	$50,000	$50,000	$50,000	$50,000	$50,000

"NOTE.—The above appropriations are payable from the special University of Illinois Fund provided by a special annual property tax of 623 cents per $100 assessed value of taxable property. This raises approximately 2½ millions per annum. The balance of the appropriations is met from the General Revenue Fund."

[fol. 31] IN UNITED STATES CUSTOMS COURT

Appeal 3441

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINIOS, Appellant,

v.

THE UNITED STATES, Appellee

AMENDED RETURN TO COURT OF CUSTOMS AND PATENT APPEALS.

The petitioner above named, having applied to the United States Court of Customs and Patent Appeals for a review of the questions of law and fact involved in a decision of the United States Customs Court in the above case, and the said Court having ordered this Court to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the United States Customs Court does hereby transmit to said Court of Customs and Patent Appeals the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following:

A copy of—

1. The protests enumerated in the petition, with the reports of the collector of customs.

2. The testimony taken before the Court.

[fol. 32] 3. Exhibits 1 to 5, referred to in the testimony.

4. The record in 193436-G, referred to in the testimony.

5. Exhibit 2, referred to in the testimony.

6. Motion to amend protest.

7. Stipulation of counsel.

8. The decision in question, T. D. 44758, and judgment order.

The entry papers and the Exhibits in 193436-G will be forwarded later.

Witness the Honorable Presiding Judge of the United States Customs Court, this 16th day of June, A. D. 1931.

J. W. Dale, Clerk. (Seal.)

Constitutional exemptions—Scientific apparatus.

PROTEST 235023-G/75281

May 2, 1927.

Collector of Customs, Port of Chicago, Chicago, Illinois.

SIR: We respectfully protest against the liquidation and assessment of duty on the merchandise covered by the entry hereinafter noted, assessing duty thereon at the rate of 65% ad valorem, aggregating $51.35. The merchandise consists of chemical glass-ware. The merchandise was imported from Munchen, Germany, on the S. S. President Harding, arriving on March 28, 1927, Bremen, entered under consumption entry No. 18140 IT-62041 and liquidated June 14, 1927. Such merchandise was imported by the University of Illinois to be used exclusively in the chemical laboratory for educational and instructional purposes only by such University as an educational agency of the State of Illinois.

[fol. 33] We claim that such merchandise should come in without duty, as being imported by an instrumentality of the government of the State of Illinois, for use in the execution of a governmental function and purpose, under the well-established policy of the Federal Government not to tax the States or their agencies and subdivisions. We more especially particularize the grounds of protest as follows:

"1. Said tax is illegal and wrongfully assessed.

"2. The Federal Government has no authority to impose such duty upon imports made by the State of Illinois.

"3. Such goods are necessary instrumentalities to carry on the governmental operation of the State of Illinois.

"4. The University exercises governmental functions and needs the merchandise heretofore described in the execution of such functions and intends to use the same for such purpose.

"5. The assessment is paid to prevent seizure of the property of the University of Illinois."

The Board of Trustees of the University of Illinois in Behalf of the University and the State of Illinois, by H. S. Cunningham, Secretary. Sveinbjorn Johnson, Attorney for the University of Illinois.

Received Jun. 28, 1927, Collector's Office, Custom House, Chicago, Ill.

Indorsed: Port of Chicago. Protest No. 75281 of University of Illinois, against the assessment of duty upon chemical glassware. C Entry 18140. Dated: Apr. 8, 1927. Steamer: Pres. Harding. Liquidated Jun. 14, 1927. Protest filed: June 28, 1927; Jul. 14, 1927. Respectfully referred to the Appraiser for special report. Anthony Czarnecki, Collector. Disallowed: Jul. 20, 1927. I. C. Crafts, Assistant Collector of Customs. 235023-G.

[fol. 34] REPORT OF THE COLLECTOR

United States Customs Service

District No. 39; Port: Chicago

August 19, 1927.

United States Customs Court, 641 Washington Street, New York, N. Y.:

I transmit herewith for decision—

Date of entry	Date of liquidation	Importer or protestant	Protest No.	Date protest filed
Apr. 8, 1927	June 14, 1927	University of Illinois	75281	June 28, 1927

The following statement relative to the rate imposed or assessment complained of is submitted:

Description of Merchandise and Assessment

The merchandise consists of chemical glassware assessed for duty at 65% ad valorem under Par. 218, Act of 1922.

Reasons and Authority for Action

The entries, invoices, and official special reports covered by the protests are herewith inclosed.

Reference is made to Abstracts 50335 and 50485.

The requirements of Section 514, Part 3, Tariff Act of 1922, were complied with.

Respectfully, Anthony Czarnecki, Collector.

NOTE.—In transmitting protests, the requirements of Articles 775 and 779, Customs Regulations of 1923, should be strictly complied with.

Received Aug. 22, 1927, U. S. Customs Court. J. W. Dale, Clerk.

[fol. 35] PROTEST 266238-G/75804

Urbana, Illinois, January 6, 1928.

Collector of Customs, Port of Chicago, Chicago, Illinois.

SIR: We respectfully protest against your liquidation and assessment of duty on the merchandise covered by the entry hereinafter noted, assessing duty thereon at the rate of 30% ad valorem and aggregating $149.70. The merchandise consists of scientific apparatus imported from London by the University of Illinois on the S. S. Antonia on July 14, 1927, entered under consumption entry No. 3532 and liquidated December 16, 1927, at the port of Chicago, I. T. No. CM 23. Such merchandise was imported by the University of Illinois for use in the department of electrical engineering, and exclusively in the work of the University as an educational agency of the State of Illinois.

We claim that such merchandise should come in without duty, as being imported by an instrumentality of the government of the State of Illinois, for use in the execution of a governmental function and purpose, under the well-established policy of the Federal Government not to tax the States or their agencies and subdivisions. We more especially particularize the grounds of protest as follows:

"1. Said tax is illegal and wrongfully assessed.

"2. The Federal Government has no authority to impose such duty upon imports made by the State of Illinois.

"3. Such goods are necessary instrumentalities to carry on the governmental operations of the State of Illinois.

"4. The University exercises governmental functions and needs the merchandise heretofore described in the execution of such functions and intends to use the same for such purpose.

[fol. 36] "5. The assessment is paid to prevent seizure of the property of the University of Illinois."

The Board of Trustees of the University of Illinois in behalf of the University and the State of Illinois and of itself, by H. S. Cunningham, Secretary. Sveinbjorn Johnson, Attorney for the University of Illinois.

Received Jan. 10, 1928, Collector's Office, Custom House, Chicago, Ill.

Indorsed: Port of Chicago. Protest No. 75804 of University of Illinois against the assessment of duty upon scientific apparatus. C Entry 3532. Dated: Aug. 26, 1927. Steamer: Antonia. Liquidated: Dec. 16, 1927. Protest filed Jan. 10, 1928; Jan. 11, 1928. Respectfully referred to the Appraiser for special report. Anthony Czarnecki, Collector. Disallowed: Jan. 14, 1928. J. W. Mahoney, Deputy Collector of Customs. 266238-G. Received Feb. 17, 1928, U. S. Customs Court, J. W. Dale, Clerk.

REPORT OF THE COLLECTOR

United States Customs Service

District No. 39; Port: Chicago

February 15, 1928.

United States Customs Court, 641 Washington Street, New York, N. Y.:

I transmit herewith for decision—

Date of entry	Date of liquidation	Importer or protestant	Protest No.	Date protest filed
Aug. 26, 1927	Dec. 16, 1927	University of Illinois	75804	Jan. 10, 1928

[fol. 37] The following statement relative to the rate imposed or assessment complained of is submitted:

Description of Merchandise and Assessment

The merchandise consists of an electrical machine and parts, assessed for duty at 30% ad valorem under Par. 372, Act of 1922.

Reasons and Authority for Action

The entries, invoices, and official special reports covered by the protests are herewith enclosed.

The requirements of Section 514, Part 3, Tariff Act of 1922, were complied with.

Respectfully, Anthony Czarnecki, Collector.

NOTE.—In transmitting protests, the requirements of Articles 775 and 779, Customs Regulations of 1923, should be strictly complied with.

Received Feb. 17, 1928, U. S. Customs Court. J. W. Dale, Clerk.

PROTEST 266239-G/75825

May 21, 1927; Jan. 17, 1928.

Collector of Customs, Port of Chicago, Chicago, Illinois.

SIR: We respectfully protest against your liquidation and assessment of duty on the merchandise covered by the entry hereinafter noted, assessing duty thereon at the rate of 45% ad valorem and aggregating $747.90. The merchandise consists of scientific instrument and parts imported in one case from England on the S. S. Minnewaska, leaving England on April 23, 1927, and arriving on May 3, 1927, entered under consumption entry No. X 2703 at the Port of New York and IT No. 69406, and liquidated at [fol. 38] the Port of Chicago, Jan. 16, 1928. Such merchandise was imported by the University of Illinois for use in one of the departments thereof exclusively for educational and instructional purposes as an educational agency of the State of Illinois.

We claim that such merchandise should come in without duty, as being imported by an instrumentality of the government of the State of Illinois, for use in the execution of a governmental function and purpose, under the well-established policy of the Federal Government not to tax the States or their agencies and subdivisions. We more especially particularize the grounds of protest as follows:

"1. Said tax is illegal and wrongfully assessed.

"2. The Federal Government has no authority to impose such duty upon imports made by the State of Illinois.

"3. Such goods are necessary instrumentalities to carry on the Governmental operations of the State of Illinois.

"4. The University exercises Governmental functions and needs the merchandise heretofore described in the execution of such functions and intends to use the same for such purpose.

"5. The assessment is paid to prevent seizure of the property of the University of Illinois."

The Board of Trustees of the University of Illinois in behalf of the University and the State of Illinois, by H. S. Cunningham, Secretary. Sveinbjorn Johnson, Attorney for the University of Illinois.

Received Jan. 18, 1928, Collector's Office, Custom House, Chicago. Ill.

Indorsed: Port of Chicago. Protest No. 75825 of University of Illinois against the assessment of duty upon scientific instruments. C entry 21168. Dated: Jun. 2, 1927. Steamer: Minnewaska. Liquidated: Jan. 16, 1928. Protest filed Jan. 18, 1928; Jan. 26, 1928. Respectfully referred [fol. 39] to the Appraiser for special report. Anthony Czarnecki, Collector. 266239-G. Disallowed: Feb. 7, 1928. J. W. Mahoney, Deputy Collector of Customs. Hensel, Bruckmann & Lorbacher, Inc. Received Feb. 17, 1928, U. S. Customs Court. J. W. Dale, Clerk.

REPORT OF THE COLLECTOR

United States Customs Service

District No. 39; Port: Chicago

February 15, 1928.

United States Customs Court, 641 Washington Street, New York, N. Y.:

I transmit herewith for decision—

Date of entry	Date of liquidation	Importer or protestant	Protest No.	Date protest filed
June 2, 1927	Jan. 16, 1928	University of Illinois	75825	Jan. 18, 1928

The following statement relative to the rate imposed or assessment complained of is submitted:

Description of Merchandise and Assessment

The merchandise consists of an optical instrument assessed for duty at 45% ad valorem under Par. 228, Act of 1922.

Reasons and Authority for Action

The entries, invoices, and official special reports covered by the protests are herewith inclosed.

The requirements of Section 514, Part 3, Tariff Act of 1922, were complied with.

Respectfully, Anthony Czarnecki, Collector.

[fol. 40] NOTE.—In transmitting protests, the requirements of Articles 775 and 779, Customs Regulations of 1923, should be strictly complied with.

Received Feb. 17, 1928, U. S. Customs Court. J. W. Dale, Clerk.

PROTEST 301714-G/76471

Urbana, Illinois, May 18, 1928.

Collector of Customs, Port of Chicago, Chicago, Illinois.

SIR: We respectfully protest against your liquidation and assessment of duty on the merchandise covered by the

entry hereinafter noted, assessing duty thereon at the rate of 40% amounting to $654.80, upon a valuation of $1,637. The merchandise consists of scientific instruments in two cases, imported from Rotterdam on the Du S. S. Nieu Amsterdam on April 16, 1928, entered under consumption entry No. 18558 I. T. No. 63336, and liquidated by you at the Port of Chicago, May 7, 1928. The merchandise aforesaid was imported for the University of Illinois for use in one of its departments, exclusively in the work of the University as an educational agency of the State of Illinois.

We claim that such merchandise should come in without duty, as being imported by an instrumentality of the government of the State of Illinois, for use in the execution of a governmental function and purpose, under the well-established policy of the Federal Government not to tax the States or their agencies and subdivisions. We more especially particularize the grounds of protest as follows:

"1. Said tax is illegal and wrongfully assessed.

"2. The Federal Government has no authority to impose such duty upon imports made by the State of Illinois.

"3. Such goods are necessary instrumentalities to carry on the Governmental operation in the State of Illinois.

"4. The University exercises Governmental functions and needs the merchandise heretofore described in the exe- [fol. 41] cution of such functions and intends to use the same for such purpose.

"5. The assessment is paid to prevent seizure of the property of the University of Illinois."

The Board of Trustees of the University of Illinois in behalf of the University and the State of Illinois, by H. S. Cunningham, Secretary. Sveinbjorn Johnson, Attorney for the University of Illinois.

Received May 24, 1928, Collector's Office, Custom House, Chicago, Ill.

Indorsed: Port of Chicago: Protest No. 76471 of The Board of Trustees of the University of Illinois against the assessment of duty upon Federal Government assessing duty on imports of State University. C. Entry 18558,

4/23/28. Steamer: Nieu Amsterdam. Liquidated: May 7, 1928. Protest filed May 24, 1928; Jun. 1, 1928; Jul. 7, 1928. Respectfully referred to the Appraiser for special report. Anthony Czarnecki, Collector. Disallowed: Aug. 2, 1928. J. W. Mahoney, Deputy Collector of Customs. 301714-G. Received Aug. 8, 1928, U. S. Customs Court. J. W. Dale, Clerk.

REPORT OF THE COLLECTOR

United States Customs Service

District No. 39; Port: Chicago

August 7, 1928.

Board of U. S. General Appraisers, 641 Washington Street, New York, N. Y.:

I transmit herewith for decision—

Date of entry	Date of liquidation	Importer or protestant	Protest No.	Date protest filed
Apr. 23, 1928	May 7, 1928	The Board of Trustees of the University of Illinois	76471	May 24, 1928

[fol. 42] The following statement relative to the rate imposed or assessment complained of is submitted:

Description of Merchandise and Assessment

The merchandise consists of scientific apparatus and parts assessed for duty at 40% ad valorem under Par. 360, Act of 1922.

Reasons and Authority for Action

Reference is made to Abstract 50335.

The entries, invoices, and official special reports covered by the protests are herewith inclosed.

The requirements of Section 514, Part 3, Tariff Act of 1922, were complied with.

Respectfully, Anthony Czarnecki, Collector.

NOTE.—In transmitting protests, the requirements of Articles 775 and 779, Customs Regulations of 1923, should be strictly complied with.

Received Aug. 8, 1928, U. S. Customs Court. J. W. Dale, Clerk.

IN UNITED STATES CUSTOMS COURT

Protests Nos. 235023-G, 266238-G, 266239-G, 301714-G

UNIVERSITY OF ILLINOIS, Plaintiff,

vs.

THE UNITED STATES, Defendant

Before Associate Justice Tilson

Statement of Evidence

Chicago, Illinois, June 25, 1929.

APPEARANCES

Sveinbjorn Johnson, Esq., attorney for the plaintiff.

Charles D. Lawrence, Esq., Assistant Attorney General, [fol. 43] for the defendant, By James R. Ryan, Esq., special attorney, of counsel.

COLLOQUY

Mr. Johnson: Sometime in 1927 the University of Illinois protested the collection of import duty on scientific instruments. In due time testimony was offered and the case was submitted to this Court. On October 29, 1928, the Court, one division of the Court, decided against the importer. Counsel for the importer took steps to appeal to the United States Court of Customs Appeals but, upon further consideration decided to put the evidence in in another case with a view to filling in certain gaps in the testimony which were disclosed by the decision of the Court on October 29, 1928. So, the purpose of this hearing and our purpose here is pursuant to a stipulation entered into with the Government at the December Term in 1928. First, we stipulate or call to the attention of the Court that the record and the exhibits in that other case (which is Calendar No. 193436-G, and the decision of which is reported in T. D. 43023) may be considered a part of the record in these cases for the purposes of decision, and now wish to offer some brief additional evidence.

At the December Term in 1928 we stipulated that the record in the case which I have identified and which was decided by this Court be made a part of the record in all

of the cases that were on the calendar then and that were "Ready" yesterday. In order to facilitate the consideration of them and to save time we continued all but four and, therefore, all the testimony offered here today will be in the following four cases: 266239-G, 301714-G, 266238-G, 235023-G. All of these were on the calendar and all the others on the calendar were continued and the testimony which will be offered will have reference to all of these four cases. The witness whom I shall call will, unless otherwise indicated, offer testimony which will be equally appropriate in support of our contentions in all of the cases unless there is objection to that course.

I desire in Case No. 266239-G to move to amend the protest in a rather unimportant matter.

[fol. 44] Mr. Ryan: No objection to the amendment.

Justice Tilson: Motion granted.

Mr. Johnson: May it be understood that the protest as amended will be re-written as amended and filed with the case. May it also be understood Mr. Counsel for the Government that the testimony and exhibits in the case to which I referred is incorporated and will be considered a part of the record in this case.

Mr. Ryan: No objection. All exhibits that were in the record are incorporated.

Mr. Johnson: It will also be understood that the protest in each of these cases will be regarded as a part of the record, a part of the evidence.

Mr. Ryan: I object to it being a part of the evidence. They are in the nature of pleadings. The four cases should be consolidated and tried together and the evidence applied to each one.

Mr. Johnson: All right. I will call Mr. Edwards.

H. M. Edwards, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

Q. You heard the statement made with reference to these four cases?

A. I did.

Q. Are you familiar with the purchases which are involved in these importations?

A. I am.

Q. Mr. Edwards, I call your attention to Consumption Entry X-2703 and Exhibit No. 1 as marked for identification and ask you if you have seen that before?

A. I have.

Q. Will you tell the Court what it is?

A. This is a photostatic copy of a State warrant issued by the State Auditor.

Q. Do you know in consideration of what Exhibit No. 1 was issued?

A. This warrant was payable to the Collector of Customs in the amount of $664.80 which is in payment of duty on scientific instruments imported by the University of Illinois.

Mr. Johnson: We offer Exhibit No. 1 in evidence.

Mr. Ryan: That is evidence of the payment of duty on one of the importations.

[fol. 45] Mr. Johnson: In this particular case.

Mr. Ryan: No objection.

By Mr. Ryan:

Q. That is a photostatic copy of a cancelled check now on file in the auditor's office at Springfield?

A. Yes, sir.

Justice Tilson: Mark it Exhibit No. 1.

(Photostat referred to received in evidence and marked Exhibit No. 1, Protest No. 235023-G, &c., Chicago, Illinois, June 25, 1829.)

By Mr. Johnson:

Q. I will ask Mr. Edwards if the payment of the duty as evidenced by Exhibit No. 1 in this case was made in the usual and customary mode in such cases?

A. It was.

Q. I call your attention in case No. 301714-G to the importer's Exhibits No. 2 and No. 3 as marked for identification and ask you if you can tell us what they are?

A. This is a photostatic copy of a warrant issued by the auditor of the State of Illinois. The payee is J. E. Bernard Company, Inc., who acted as importing agent for the

University of Illinois, $654.80 of which was payment of duty on scientific instruments imported from Europe on Customs Entry No. 18558.

Q. As to Exhibit No. 2 can you tell us what that is?

A. That is a receipt for $654.80 issued by the Customs House, Chicago.

Mr. Johnson: We offer in evidence Importer's Exhibits No. 2 and No. 3.

Mr. Ryan: No objection.

Justice Tilson: Mark them.

Q. Mr. Edwards, in case No. 266238-G I call your attention to Plaintiff's Exhibit No. 4 for identification and ask you to tell us what it is.

A. This is a State auditor's warrant drawn in favor of the Davison Freight Forwarding Company in the amount of $283.74.

[fol. 46] Q. For what was that issued?

A. $224.55 of this amount was to cover duty on measuring apparatus imported by the University of Illinois on Consumption Entry 3532. The balance of the amount goes to make up incidental expenses in importing such as freight, entry, insurance and so on.

Q. Mr. Edwards, will you kindly examine the exhibits which you hold in your hand and tell us whether there is correction to be made in the duty?

A. The original duty assessed on this shipment was 45 per cent. It was later changed to thirty per cent and a refund was made to the University in the amount of $74.85.

Q. Was the correct amount of duty made to the collector?

A. $149.70.

Mr. Johnson: The importer offers in evidence Exhibit No. 4.

Mr. Ryan: No objection.

Justice Tilson: Mark it.

(Document referred to received in evidence and marked Exhibit No. 4, Protest 235023-G, &c., Chicago, Illinois, June 25, 1929.)

Q. In Calendar No. 235023-G I show you Plaintiff's Exhibit No. 5 for identification and ask you to explain what that is?

A. This is a warrant issued by the State auditor in favor of the American Express Company for $79.70, $51.35 of which is in payment of duty on chemical glassware imported by the University of Illinois. The balance of the amount is for incidental expenses connected with importation.

Mr. Johnson: I offer in evidence Plaintiff's Exhibit No. 5.

Mr. Ryan: No objection.

Justice Tilson: Mark it.

(Document referred to received in evidence and marked Exhibit No. 5, Protest 235023-G, &c., Chicago, Illinois, June 25, 1929.)

Q. Mr. Edwards, with reference to Exhibits Nos. 1, 3, 4, and 5, I ask you if the checks or drafts of which these ex-
[fol. 47] hibits are the photostatic copies were drawn upon funds appropriated by the Legislature of Illinois to the University of Illinois?

Mr. Ryan: I object unless there is something to show that this witness knows upon what ones they were drawn.

Q. Are you familiar in your capacity as purchasing agent with the sources of income, the revenue of the University of Illinois?

A. I am.

Q. And from which items are paid through your department?

A. Yes.

Mr. Johnson: Now, Mr. Reporter, please read my original question.

Question read as follows:

Q. "Mr. Edwards, with reference to Exhibits Nos. 1, 3, 4 and 5, I ask you if the checks or drafts of which these exhibits are the photostatic copies were drawn upon funds appropriated by the Legislature of Illinois to the University of Illinois?"

The Witness: They were.

Q. I take it from your statement that the payments of duty on these cases were made in the usual and ordinary course of business and in the usual and ordinary manner?

A. They were.

Q. How long have you been purchasing agent?

A. Twelve years.

Q. Is there any policy in your Department or pursued by the University with respect to the purchase of equipment and supplies in the domestic market or in the foreign market?

Mr. Ryan: I respectfully object.

Mr. Johnson: If I may explain, the reason for asking the question is this: The contention was made by the Government in the other case to which I have referred that the duty really had a double or dual aspect, that of a tax to protect industry. My purpose in asking this question is to show that this University is paying a tax and that it pur-[fol. 48] chases abroad only when it cannot find the scientific equipment in the domestic market.

Mr. Ryan: I ask to have Judge Johnson's remarks stricken from the record.

Justice Tilson: I will allow him to prove it.

The Witness: It is the policy of the University to import when articles that are required cannot be obtained in this country.

Justice Tilson: Say what the University does.

Q. Is that the practice?

A. That is the present practice of the University.

Q. Has it been the practice since you have been purchasing agent?

A. It has, in the main, for the twelve years.

Mr. Ryan: No questions.

Horace B. Ingalls, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Mr. Ryan: The Government will admit that the student fees do not in any substantial degree support the University of the State of Illinois, but, in so conceding this fact, we contend, while admitting that the legislature makes appropriations for the University, that it is a private educa-

tional corporation and not a part of the sovereign State of Illinois.

Direct examination.

By Mr. Johnson:

Q. Mr. Ingalls, is the University supported to any extent by gate receipts, for example, collections for admission to football games?

Mr. Ryan: I object to that question as calling for a conclusion as to what is substantial.

Justice Tilson: Strike it out.

Q. Mr. Ingalls, is there any money that finds its way into the money available for the purchases of supplies which comes from the proceeds of collections from athletic games?

A. There is none.

[fol. 49] Q. Do you know the sources of income?

A. I do.

Q. Are you familiar with the sources from which the revenue came with which the University operated the first two years of its existence? A. Yes.

Q. Will you please tell the Court from what source?

Mr. Ryan: It was opened in 1854.

Mr. Johnson: It was opened in 1867.

Mr. Ryan: We will admit it is a Land Grant College.

Q. Read it into the record.

A. The report of the Treasurer at a meeting of the Board of Trustees, the Second Annual Meeting.

Q. As found in the Annual Report of the Trustees?

A. At page 106.

"Cr.

"By $40,000 from Champaign County Bonds	$40,000.00
By Interest on $125,000 Illinois Bonds	3,750.00
By Rent on Farm	500.00
	$45,250.00"

Q. With reference to the items which have been read into the record from the first report of the Board of Trustees—

Mr. Ryan (interrupting): Whom is it made to?
Mr. Johnson: To the Governor.

Q. I ask you if you know what is meant by the item in the receipts "Interest on Illinois Bonds"?

Mr. Ryan: I object as being immaterial.
Mr. Johnson: That is all.
Mr. Ryan: No questions.

[fols. 50-50e] ELLERY B. PAINE, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

Q. In Case No. 266238-G I call your attention to an importation of scientific apparatus and ask you if you recall or know of that purchase?
A. I do.
Q. Was it made on your order?
A. Yes.
Q. On your requisition?
A. Yes.
Q. Before you ordered that purchase from abroad will you tell us what if anything you did to see if you could purchase in this country?
A. We wrote the several manufacturers of electrical apparatus such as the General Electric Company, Westinghouse. They answered us that they were not prepared to make quotation on such specifications.
Q. Is that in keeping with the policy of your department with regard to the purchase of equipment?

Mr. Ryan: I object.
Justice Tilson: Overruled.
The Wtiness: It is the practice.
Mr. Ryan: I will admit if these witnesses who are now present were called they would testify substantially as the witness on the stand but object to such testimony as irrelevant, immaterial and inadmissible.

Justice Tilson: I will allow it.

Mr. Johnson: Submitted.

Mr. Ryan: Submitted.

Mr. Johnson: I request time for the filing of brief, your Honor.

Justice Tilson: I will allow thirty days after the transcription and filing of the testimony for the filing of brief by plaintiff, and thirty days thereafter for the Government.

I do certify that the foregoing transcript is a correct and true transcription of all testimony offered, heard or introduced by either party on the trial, together with all the objections made, rulings thereon, and exceptions thereto.

Edmund J. Devlin, per S. C. H.

(Submitted.)

[fols. 51-59] IN U. S. CUSTOMS COURT, FIRST DIVISION

Protest No. 193436-G

UNIVERSITY OF ILLINOIS, Plaintiff,

vs.

THE UNITED STATES, Defendant

Before Associate Justice Young

Statement of Evidence

Chicago, Ill., January 5, 1927.

APPEARANCES

Sveinbjorn Johnson, Esq., attorney for the plaintiff.

John F. Kavanagh, Esq., special attorney, for the defendant.

[fols. 60-62] LLOYD MOREY, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

Q. Your name is Lloyd Morey?

A. Yes, sir.

Q. What is your official position?

A. Comptroller of the Board of Trustees of the University of Illinois.

Q. Are you an officer of the Board of Trustees of the University of Illinois?

A. Yes, sir.

[fol. 63] By Mr. Johnson:

Q. Mr. Morey, how long have you been with the University?

A. Since 1912.

Q. In the capacity of comptroller, most of that time?

A. Since 1916.

Q. How did you get your position?

A. I am elected annually.

Q. By whom?

A. By the Board of Trustees.

Q. How is the Board constituted?

A. It is made up of nine members who are elected by the people of the State, by popular election.

Q. Any ex-officio members?

A. Two, both elected by the people of the State.

Q. Does the University hold any property?

A. Yes, sir; the Board of Trustees holds titles to property.

Q. What is the nature of that property?

A. Both real and personal.

Q. And under whose control is the property?

A. Under the control of the Board of Trustees, acting in their capacities and according to the statutes.

Q. And beyond that it is under the control of what body?

A. The general assembly of the State of Illinois.

Q. In your capacity as comptroller do you make any reports to any State officer?

A. Yes, sir.

Q. To what officer?

A. The Governor, and auditor of public accounts.

Q. What is done with your report after it is received?

A. It becomes a part of the records of the State.

Mr. Kavanagh: That is objected to as an opinion, not properly proved.

Justice Young: What do you mean by that?

Mr. Kavanagh: Well, he says they form a part of the records of the State. How do we know that?

By Mr. Johnson:

Q. I will ask you another question. Mr. Morey, just what do you mean by that when you say they become a [fol. 64] part of the records of the State?

A. For example, I make a report to the State auditor of public accounts of the property and that report appears in the report of the auditor of public accounts that the property listed in it is reported as State property.

Q. Mr. Morey, as comptroller of the University, you have information as to the sources of income of the institution?

A. Yes, sir.

Q. Please state the primary sources of income?

A. They are from appropriations by the State of Illinois, which is the general assembly of the State of Illinois, out of State funds; by appropriations from Federal funds by the Congress of the United States, and the income from an endowment established by the Congress of the United States.

Q. Now, then, how does the Congress make these appropriations? What I mean is are the appropriations made directly to the University in all cases, or are they made to the State of Illinois and then reappropriated to the University by the Legislature?

A. Some are made to the University and some to the State, which are reappropriated.

Q. Do you have in mind any of the acts, Congressional acts, under which appropriations of the kind you have described are made?

A. I can refer to them exactly if I may refer to a copy of my files. I refer to the so-called Morrill Act of 1890.

Q. Any others?

A. To the so-called Nelson Act, of 1907.

Q. Any others?

A. To the so-called Hatch Act, of 1881.

Mr. Kavanagh: Pardon me, are those Congressional acts?

Mr. Johnson: Yes, sir; this is just for our information.

A. (Continuing:) To the so-called Adams Act of 1906, to the so-called Smith-Lever Act of 1914, to the so-called Smith-Hughes Act of 1917, to the so-called Purnell Act of 1925.

Q. Under these acts the Government, or the Congress of the United States has appropriated to the use of the [fol. 65] University of Illinois directly or indirectly substantial sums as are in the Act?

A. Yes, sir.

Q. And the funds of which you have spoken are those received from the State of Illinois and from the Government of the United States, are devoted to what uses?

A. To educational purposes.

Q. Is there any tuition required or asked in the institution?

A. No, sir; not to the extent of covering the cost of instruction.

Mr. Kavanagh: That is objected to.

Justice Young: Just tell what it is.

By Mr. Johnson:

Q. What do you mean by tuition?

A. When you asked me if there is tuition I interpret that as meaning a charge made to cover all the costs of education. We do not charge tuition. There are certain small service charges made.

Q. Called what?

A. Called incidental matriculation fees, etc.

Q. They are for special service, as I understand it, such as library fees, for use of the library, and so forth?

A. And examination fees.

Justice Young: How much do those amount to each year?

The Witness: The gross amount, do you mean?

By Mr. Johnson:

Q. Or per student?

A. An average of about $60.00 per student.

Q. Then you have stated the primary sources of the income of the University entirely?

A. Yes, sir.

Q. There are, of course, some secondary sources like those of which you have spoken, which amount as I understand merely to a turnover of appropriations made, and a turnover again into cash afterwards for services and

commodities and so on, which are incidental to the work of the University.

[fol. 66] Mr. Kavanagh: I object to the form of the question as practically telling the witness.

Mr. Johnson: I will withdraw the question. I am not interested in proving that.

Justice Young: Objection overruled.

Mr. Kavanagh: Exception.

By Mr. Johnson:

Q. You may answer. You can answer "yes" or "no."

A. Your statement is substantially correct.

Mr. Johnson: You can have an explanation of that if the Court wishes.

Justice Young: Yes.

Q. Explain in a general way just what you mean by that?

A. There are certain items of income from the sale of products resulting from the educational activities of the University.

Justice Young: As I understand it those things that are made and sold, are not primarily made for getting money out of it, but for the purpose of affording instruction to the students. That is the first purpose?

The Witness: That is the first purpose.

Justice Young: Instead of giving them away they turn them into such money as they can get out of them.

The Witness: Yes, sir.

By Mr. Johnson:

Q. That is what you meant by incidental uses?

A. No activity is carried on for the primary purpose of making money or making profit.

Q. The University is not engaged in any activity primarily for profit?

A. No, sir.

Justice Young: From the standpoint of dollars and cents it is very bad business for a State to conduct this University. It is a heavy drain on the State treasury. From a business standpoint and from the standpoint of profit, it

[fol. 67] might be better to close it up. Is that right? I am talking about dollars and cents now.

The Witness: The University is costing the State out of its tax levies and other revenues five and a quarter million dollars a year at the present time.

By Mr. Johnson:

Q. As I understand you then, to close this topic we are talking about all the money appropriated by the Legislature and by Congress, and that represents the two primary sources, the University is devoted to instructional and educational properties?

A. Yes, sir.

Mr. Kavanagh: You are not going to prove from this witness the use to which this imported merchandise was put?

Mr. Johnson: I intended to do that by another witness, but I can just as well.

Justice Young: If you have another witness it would be better.

Cross-examination.

By Mr. Kavanagh:

Mr. Kavanagh: I will cross-examine this gentleman on the facts brought out by Mr. Johnson.

X Q. How many students has the University of Illinois?

A. Approximately 12,000.

X Q. And how many of them come from the State of Illinois?

A. Approximately 10,000.

X Q. 2,000 are from other parts of the United States, and possibly from Europe?

A. Yes, sir.

X Q. Now, these 2,000 that come from the other parts of the United States and from Europe, do they receive free tuition?

A. No, sir. They pay a small tuition charge.

X Q. What is the small tuition charge?

A. 50 per cent of the incidental fees.

X Q. What would that amount to in dollars and cents?

A. $25.00 a year.

X Q. That is the only charge you make to students from outside of the State of Illinois and Europe. Of course you [fol. 68] charge for the textbooks?

A. Yes, sir. The students have to purchase their own textbooks outside.

X Q. The University derives a revenue from the sale of textbooks to students coming from outside of the State of Illinois?

A. It does not sell textbooks to students.

X Q. Haven't they a university book store?

A. Operated by private parties.

X Q. Having no connection with the university?

A. No.

X Q. The University of Illinois derives a large income from the athletic activities of the students?

A. No, sir; the University as such does not derive income from athletics.

X Q. What becomes of the proceeds of these football athletics?

A. The entire collegiate athletics are operated by a corporation organized at the Athletic Association.

X Q. Do they not in turn, turn in some or all of the money to the University?

A. No, sir; they apply it all to educational purposes, but it is handled in a separate treasury.

X Q. This stadium that was recently built out there, how much did it cost?

A. One million seven hundred thousand dollars.

X Q. Where did the money come from?

A. From private subscription, of former students, citizens and others entirely.

X Q. No part from the University of athletic association?

A. No part.

X Q. You receive quite a large amount of money, do you not, from endowments?

A. No, sir; we have a very small amount of endowments outside of the endowment made by Congress, which I have referred to.

X Q. How much do you get annually in private endowments, that is from alumni.

A. The only income is not in excess of $20,000 a year.

X Q. That is the income?

A. That is the income.

X Q. And at five per cent that would indicate that is about four million dollars?

A. Oh, no, four hundred thousand dollars.

X Q. You get $2000?

A. Yes.

X Q. And that is all your private endowment is, four hundred thousand dollars?

A. Practically. It is not that much. I have stated that rather high.

[fol. 69] X Q. Would you consider that receiving appropirations from Congress, that that would make the University of Illinois just as much a national institution as it would a State institution?

Mr. Johnson: This is objected to as calling for a legal conclusion.

Justice Young: It is cross-examination. He may answer.

A. I hesitate to answer that because I don't feel competent. The University is primarily a State institution as I understand it, a division of the Government of the State and operating under the General Assembly of the State of Illinois. The fact that it receives appropriations from Congress gives it a certain national aspect I should think.

X Q. What is the average annual appropriation from Congress to the State of Illinois for the University?

A. About $340,000 per annum.

X Q. $340,000 a year? The National Government also maintains at the University of Illinois what is commonly known as the R. O. T. C., you know, doesn't it?

A. Yes, sir.

X Q. It is necessary that all male students become members of that reserve officers' training corps?

A. It is.

XQ. And the National Government furnishes its own officers to conduct this training corps, doesn't it?

A. It does.

X Q. Are all the tangible assets of the University of Illinois located in the State of Illinois? In other words, do you own real property outside of the State of Illinois?

Justice Young: What has that to do with this issue?

Mr. Kavanagh: I am trying to establish, Your Honor, that this is not exclusively a State conducted institution. If

they maintain and have sources of revenue outside of the State, that would appear to bear out my contention.

Justice Young: Do you mean to say that the State cannot go outside of its own boundaries?

Mr. Kavanagh: Not for a minute, Your Honor.

Justice Young: Then, what relevancy is your question? [fol. 70] Mr. Kavanagh: That if they have sources of income from outside the State of Illinois, they are not purely and entirely State institutions.

Justice Young: I think that is a very unwarranted and illogical deduction.

Mr. Kavanagh: To which the Government attorney respectfully excepts.

Justice Young: The Court shall judge as to the limit of cross-examination. As to this particular matter I don't think it has any relevancy. Proceed.

Mr. Johnson: The witness had answered.

The Witness: No.

By Mr. Kavanagh:

X Q. Has it any personal property outside of the State of Illinois?

A. No.

X Q. I think you stated on direct examination what the income was from so-called athletic activities?

Justice Young: He said that the University derived no revenue from that source.

Mr. Johnson: He stated that it was a separate proposition.

Mr. Kavanagh: I wanted to have my memory refreshed by the amount of money.

By Mr. Kavanagh:

X Q. How much was it?

A. You asked me what the income is from athletics.

X Q. Yes.

A. The Athletic Association is organized separate from the University, a corporation, and has an income of about $400,000 a year.

X Q. Doesn't the University of Illinois, or members of the faculty exercise control over this so-called athletic corporation?

A. To a reasonable extent.

X Q. And what is that reasonable extent?

A. The members of the corporation are appointed by the Board of Trustees of the University.

X Q. They are not elected by this so-called athletic association?

A. No, sir.

[fol. 71] X Q. And the members of the faculty of the University of Illinois have control over the expenditures of this athletic association?

A. No, sir.

Mr. Johnson: I object to that. All right. I was going to object to this as wholly immaterial; the witness having explained that the University derived no income from that to be used in its educational work.

Justice Young: Objection overruled.

Mr. Kavanagh: I believe that this is pertinent.

Justice Young: It is a little bit nearer to it than some of the other questions.

Mr. Kavanagh: That is about all from this witness.

Redirect examination.

By Mr. Johnson:

R. Q. Mr. Morey, Mr. Kavanagh brought up something which suggested an omission on my part. State very briefly the departments maintained by the University, so that the Court may have a comprehensive view of the courses of instruction.

A. The departments are agriculture, engineering, otherwise known as mechanical arts; liberal arts, science, law, medicine, dentistry, pharmacy, music, library science and education, also military science and physical education.

R. Q. Which Mr. Kavanagh brought out?

A. Which Mr. Kavanagh brought up.

Mr. Kavanagh: The Court might be aided if the protestant would offer in evidence one of the year books of the University, that would in a concise and readable way show just the objects of the University, where it obtained its revenue.

Justice Young: It is stipulated that the witness may furnish to the Court a catalogue, which when identified will be marked and incorporated in the record.

(A copy of the University of Illinois Buletin, annual register, 1925-1926, which was subsequently forwarded to the Clerk of the U. S. Customs Court, was marked Exhibit 2, Protest 193136-G, of this date.)

[fol. 72] Mr. Johnson: I was wondering if Mr. Kavanagh had in mind the report of the comptroller or the annual report to the State Auditor.

Mr. Kavanagh: Assuming that a prospective student wants to enroll, he writes for a book and they send him that.

Justice Young: It can be filed with the record.

Mr. Kavanagh: No further questions from this gentleman.

H. M. Edwards, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

Q. Your name is H. M. Edwards?
A. It is.
Q. What is your position?
A. Purchasing agent for the University of Illinois.
Q. In what department is your office?
A. Business office, the office of the comptroller.
Q. In the comptroller's office?
A. Yes, sir.
Q. You are familiar with the merchandise, the duty on which is protested in the present proceedings?
A. I am.
Q. Did you have anything to do with the ordering or purchasing of the merchandise?
A. I personally ordered it.
Q. Where was it purchased?
A. The instruments in question were purchased from London concerns. It consisted of tuning forks, and tuning galvanometers, which were purchased from H. Tinsley &

Company, of London, and one X-ray spectograf, which was purchased from Adam Hilger, Limited, of London.

Q. Will you explain how that was handled, briefly?

A. In order to facilitate shipments and clearance through customs, we asked these vendors to deliver the instruments to the American Express Company, whom we had asked to act as our agents. The American Express Company in turn forwarded the shipment to the University of Illinois, consigned to the University of Illinois, Physics Department, 115 Physics Building, Urbana, Illinois.

Q. And then, Mr. Edwards, who paid for this merchandise and how, and out of what funds?

A. The merchandise was paid——

[fol. 73] Mr. Kavanagh: If he knows, Your Honor. It has not been shown that he is able to tell that.

Mr. Johnson: He is the purchasing agent.

Mr. Kavanagh: He is the purchasing agent?

Mr. Johnson: Yes.

Mr. Kavanagh: I had not heard that.

A. The merchandise was paid for from funds appropriated by the State to the University.

By Mr. Johnson:

Q. Who paid the duty and out of what funds was the duty paid?

A. The duty was paid by the American Express Company, as agent for the University.

Q. And did the University reimburse the American Express Company?

A. They received a bill from the American Express Company, which bill being vouchered, was forwarded to the State Auditor, who issues a warrant covering the bill of the American Express Company, which included the duty.

Q. As far as you know, and from your experience, is that the usual course in which bills against the State are paid?

A. That is the usual method.

Q. Was there any insurance carried on this shipment?

A. I don't know.

Mr. Johnson: I think that is all, Mr. Kavanagh.

Cross-examination.

By Mr. Kavanagh:

X Q. What did you say your official position was, please?

A. Purchasing agent for the University of Illinois.

X Q. Do you have anything to do with the bookkeeping arrangements of the University?

A. That does not fall under my department.

X Q. Then how do you know from your own knowledge that the merchandise the subject of this protest was paid for out of funds appropriated by the State of Illinois?

A. I just know that from my contact with the other departments in the business office of the University.

X Q. How do you know it in this particular instance?

A. The bills, as far as the matter of purchase by the Uni- [fol. 74] versity, go through my office. My statement was that is the way in which the University equipment is paid for.

X Q. You heard the other gentleman testify as to the sources of income of the University this morning?

A. Yes, sir.

X Q. He said some money was received by appropriation from the National Government through acts of Congress, some through appropriations of the State of Illinois, and some through private endowment. Now, are three separate and distinct banking accounts kept for each of these separate sources of income?

A. I would not be able to answer that.

X Q. Then when you say that the particular budget was paid out of funds appropriated by the State of Illinois, you really don't know that?

A. I know that payment was made.

X Q. Please answer my question "yes" or "no."

Mr. Johnson: That is an unfair question, because whether it was paid out of those funds has nothing to do with bookkeeping accounts.

Mr. Kavanagh: I am not challenging his intelligence.

(The question was repeated by the reporter as follows: "Then when you say that the particular budget was paid out of funds appropriated by the State of Illinois, you really don't know that?")

A. It is paid out of funds appropriated by the State, yes. I know that to be a fact.

By Mr. Kavanagh:

X Q. How do you know that? How can you say that?

Justice Young: It is presumed, of course, that the same dollar bills that are sent up there——

Mr. Kavanagh: I am trying to find out if they maintain separate banking accounts, and he has answered that they do not. Then, how does he know that the money came out [fol. 75] of this separate and distinct appropriation?

Mr. Johnson: Pardon me. I didn't understand the witness to say that he knew that separate accounts were kept.

The Witness: I said I could not say.

Justice Young: He stated that they were paid out of State funds. How do you know that?

The Witness: Because the shipment of this kind is bought for educational purposes, and is paid for out of appropriations made by the State.

Mr. Kavanagh: I object to that. He has not shown how he knows how it was paid out of appropriations made by the State.

Justice Young: What was the stuff at Bar?

The Witness: This equipment consists of instruments used in the physics laboratory, for educational work, and for research work. I am not competent to state the exact use of these instruments, because that is scientific.

Justice Young: That has to do with what you might call a scientific course you have there?

The Witness: Yes, it is a course in physics, yes, entirely scientific.

Redirect examination.

By Mr. Johnson:

R. Q. Is it commercial?

Justice Young: It has not any special connection, those things which the University does, through its connection with the national Government?

The Witness: No, sir.

By Mr. Johnson:

R. Q. Was this apparatus to be used or imported to be used commercially, or in connection with educational work entirely?

A. It would have no commercial use in those laboratories.

By Mr. Kavanagh:

[fol. 76] R. Q. This merchandise consisted of X-ray apparatus, did it?

A. One item was what is known as an X-ray spectrograph.

R. Q. What do they use that for?

A. I am not competent to explain the exact use of the instrument, but it is used for the purpose of measuring light rays. That is my understanding of it.

R. Q. It is used in the physics laboratory?

A. In the physics laboratory.

R. Q. Do they give lectures in this physics laboratory to people other than students at the University?

A. Not that I know of.

R. Q. You would not say that they do not?

A. Not positively.

R. Q. Do they ever have lectures in which they use scientific instruments wherein they charge an admission fee?

A. In this department?

R. Q. In the University of Illinois.

A. Not to my knowledge.

R. Q. You don't know?

A. No, sir.

R. Q. What was this other merchandise besides the X-ray spectrograph?

A. That was a tuning fork.

R. Q. That is also used in the physics laboratory?

A. That is also used in the physics laboratory. That is used in——

R. Q. Recording sound?

A. Not in this way.

R. Q. Anything else besides tuning forks?

A. Two galvanometers.

R. Q. That is for measuring electric current?

A. That is for measuring electric current.

R. Q. Do they use those in lectures to which they admit others than students in the University?

A. I can't conceive of a possibility of someone being in on one of the lectures or demonstrations.

R. Q. Without being charged an admission fee?

A. Without being charged.

R. Q. What becomes of this merchandise, that is the tuning forks and the X-ray spect-ograph, and so on, when [fol. 77] the University wishes to dispose of them? Do they give them away or sell them?

A. We could do either.

R. Q. And do you do both?

Justice Young: That has not very much relevancy to this case. He may answer.

A. Do you ask if we could both sell it or give it away?

By Mr. Kavanagh:

R. Q. Yes, which do you do, or both?

Justice Young: What has that to do with the case?

Mr. Johnson: What are you asking, about the apparatus?

Mr. Kavanagh: They might derive profit out of the merchandise and sell it for more than it cost them.

Mr. Johnson: A second-hand apparatus?

Mr. Kavanagh: They might get it at a bargain.

The Witness: Sometimes we have such equipment, which is sold, sometimes we have equipment that we just have to throw away.

By Mr. Kavanagh:

R. Q. But it is possible that this merchandise could be sold if the University no longer wished to keep it?

A. If we found someone who wanted it and was willing to pay for it.

Justice Young: You didn't buy it and sell it, did you?

The Witness: Absolutely no.

Mr. Kavanagh: I guess that is all.

Mr. Johnson: I think that is all; unless you want to make some explanation in connection with this testimony; some matter that has not been covered.

The Witness: No.

[fol. 78] LLOYD MOREY, a witness called on behalf of the plaintiff, was recalled, and testified further as follows:

Direct examination.

By Mr. Johnson:

Q. Do you know in what department these instruments which were imported and which are here in controversy are to be used?

A. Yes, in the physics department.

Q. And are they to be used for any purpose other than educational?

A. No, sir.

Q. I think you said you were familiar with the charter of the University. Does the University have a charter that is framed up on the wall some place, or where is the charter?

A. It does not have a charter that is framed, but its charter consists of an Act of 1867, of the General Assembly.

[fol. 79] The Witness: Mr. Edward was unable to answer fully the question regarding funds. I might add a short explanation regarding that point.

Justice Young: I think that is pretty thoroughly covered.

The Witness: I am familiar with the handling of all of the funds of the University and the various funds are kept separately. Separate accounts are kept. The appropriations made by Congress are not available for the purchase of equipment of this kind. They are for special purposes, stated in the acts.

Justice Young: That is my recollection.

The Witness: The collections made from students are for service charges of various kinds. Funds for equipment are appropriated by the general assembly only, and that is the only source from which a purchase of this kind could be made.

By Mr. Johnson:

Q. I will ask you now whether the students' or incidental fees are available for the purchase of merchandise of this sort?

A. They are not generally available for that.

Cross-examination.

By Mr. Kavanagh:

X Q. Have you got the voucher that paid for this merchandise?

A. I don't have it here.

X Q. Would that voucher show what fund is drawn on?

A. I presume it would.

[fols. 80-84] Mr. Kavanagh: Do you wish to offer it, Mr. Johnson?

Mr. Johnson: I don't have it. I wish to ask Mr. Edwards one question.

H. M. Edwards, a witness for the plaintiff, was recalled and testified further as follows:

Redirect examination.

By Mr. Johnson:

R. Q. Was this merchandise purchased f. o. b. London?

A. Purchased f. o. b. London.

Mr. Johnson: We submit.

I do certify that the foregoing transcript is a correct and true transcription of all testimony offered, heard or introduced by either party on the trial, together with all the objections made, rulings thereon and exceptions thereto.

S. C. Hudnell.

[fol. 85] In United States Customs Court

In re Protest No. 266239-G, Collector's Protest No. 75825

[Title omitted]

Motion to Amend Protest

The above entitled Protestant moves to amend the Collector's Protest herein, No. 75825, to conform with the facts, and the first paragraph thereof, by striking from the third line thereof the figures "45%" and inserting in lieu thereof the figures "40%"; and by striking from the

same line the figures "$747.90"; and inserting in lieu thereof the figures "$664.80", and that as so amended the said protest be a part of the record herein.

Sveinbjorn Johnson, Attorney for the Protestant.

Received June 25, 1929, U. S. Customs Court, Port of Chicago. J. W. Dale, Clerk, by E. J. D. Reporter.

Denied June 25, 1929. Wm. J. Tilson, Justice

IN U. S. CUSTOMS COURT

In re Calendar Nos. 301714-G, 235023-G, 266239-G, and 266238-G

[Title omitted]

STIPULATION AS TO TESTIMONY

Whereas counsel for both parties in the above entitled matter, when the same came up for hearing before the [fol. 86] above named court at Chicago on July 26, 1929, stipulated that Professor G. L. Clarke and Dr. A. P. Carman, if called as witnesses, would testify, in substance, to the same effect, as Professor Payne who testified with reference to case No. 266238-G, supra.

Now, therefore, be it stipulated and agreed by and between the parties hereto and their counsel that the testimony of Professor G. L. Clarke, had he been called to the witness stand, would have referred to Case No. 235023-G, and that the testimony of Professor A. P. Carman, had he been called to the witness stand, would have referred to Cases Nos. 301714-G and 266239-G; that the equipment in the last two named cases consisted of a microfotometer and a quartz spectograph, respectively, whereas the equipment with reference to which Professor Clarke would have testified was Jenna glass.

It is stipulated and agreed that these witnesses, had they been called to the stand, would, in their respective cases, have testified, in substance, as did Professor Payne, to the effect that they made unavailing efforts to obtain equipment which would meet the needs of their departments in this country before requisitioning a purchase abroad, and that they would have testified that the equipment, in each and all of the cases concerning which the testimony of these two witnesses would have been given

had they been called to the stand, was not obtainable in the United States and for that reason was imported from abroad.

It is understood that this stipulation concerning the testimony of the witnesses Clarke and Carman is in all respects subject to the objection made by counsel for the Government when Dr. Payne testified, namely: that such testimony was irrelevant, incompetent and immaterial upon any issue or point involved in this lawsuit; that is to say, this stipulation is in all respects made subject to each and all objections made by counsel for the Government to the admissibility of the testimony of Dr. Payne upon the points covered in this stipulation, and such objections shall be regarded as having been interposed against the testimony of the witnesses Clarke and Carman.

It is stipulated and agreed that the Court in deciding the above entitled matter shall do so giving full legal effect [fol. 87] to this stipulation concerning this part of the record.

Dated this twenty-ninth day of July, 1929.

Sveinbjorn Johnson, Counsel for the Importer.
James R. Ryan, for Assistant Attorney General for the United States, Defendant.

Received Jul. 30, 1929, U. S. Customs Court. J. W. Dale, Clerk.

IN U. S. CUSTOMS COURT, THIRD DIVISION

(T. D. 44758)

Protests 235023-G, etc., Against the Decision of the Collector of Customs at the Port of Chicago

UNIVERSITY OF ILLINOIS

v.

UNITED STATES

(Decided March 30, 1931)

OPINION

YOUNG, Judge:

This is a suit against the United States arising at the port of Chicago brought to recover certain customs duties

alleged to have been illegally exacted upon certain scientific apparatus, the plaintiff claiming judgment against the defendant for the sum of $1,572.40. The appraiser reports the merchandise to consist of scientific articles in chief value of glass, an electrical machine and parts thereof, and an optical instrument. Duty was assessed thereon at the appropriate rates under the appropriate paragraphs of the Tariff Act of 1922.

The plaintiff bases its claims upon the following grounds:

We claim that such merchandise should come in without duty, as being imported by an instrumentality of the Government of the State of Illinois, for use in the execution [fol. 88] of a Government function and purpose, under the well-established policy of the Federal Government not to tax the states or their agencies and subdivisions. We more especially particularize the grounds of protest as follows:

1. Said tax is illegal and wrongfully assessed.

2. The Federal Government has no authority to impose such duty upon imports made by the State of Illinois.

3. Such goods are necessary instrumentalities to carry on the governmental operations of the State of Illinois.

4. The University exercises governmental functions and needs the merchandise heretofore described in the execution of such functions and intends to use the same for such purpose.

5. The assessment is paid to prevent seizure of the property of the University of Illinois.

At the trial of this case the record in the case of University of Illinois et al v. United States, T. D. 43023, was incorporated with and made a part of the record herein.

The evidence shows that the University of Illinois was organized as a corporation under a special law of the State of Illinois; that it is under the control of the State; that the members of the board of trustees are elected by the people of the State; that it is supported partly by State taxes, partly from a land grant from the United States, partly by appropriations of the National Congress, partly from service charges made against the students, and partly by benefactions; that it offers a wide variety of courses of instruction; that the institution is one for higher educa-

tion—that is, education beyond that furnished in the regular courses in the high schools; that the doors are open to students from all the States of the Union and, apparently, all the countries of the world; that students from areas outside of the State of Illinois are charged higher fees than those living within the State; that the merchandise the subject of duties herein is certain laboratory equipment consisting of scientific articles in chief value of glass, an electrical machine and parts thereof, and an optical in- [fol. 89] strument; and that the duties were paid by warrants issued by the State auditor and drawn upon funds appropriated by the State Legislature of Illinois for the University of Illinois.

The purpose of the institution is to furnish instruction, at a small part of its cost, in the liberal arts, agriculture, engineering, military science, music, medicine, dentistry, pharmacy, and business administration to students from Illinois, and elsewhere, who have completed a course in a standard high school or its equivalent.

This is a very interesting and important case, partly because it is a case of first impression, there being no direct authority on the principal point involved. The decision will therefore create a new precedent.

The attorney for the plaintiff in his very able and comprehensive brief contends that the exaction complained of is a tax; that the property upon which it is sought to be levied is property used necessarily and exclusively by the University of Illinois as an educational agency; that the University is a State agency created and maintained by the State in the exercise of a power reserved to the State, viz, that of establishing and maintaining public schools; and that education is a governmental function, so that the agencies and properties used in connection therewith are exempt from Federal taxation as instrumentalities of the State created and used to facilitate the exercise of a governmental as distinguished from a proprietary purpose. He further says:

We rest our position in the case at bar primarily on the fundamental proposition laid down in a large number of cases decided by the Federal Supreme Court from the very beginning of the Government, McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, that the United States "can not exercise its power of taxation so as to destroy the State

governments, or embarrass their lawful action * * *"; Railroad Co. v. Peniston, 18 Wall. 5, 30; and that consequently, it must be presumed that Congress did not intend to authorize customs officers to collect a duty in the circumstances of the present case, notwithstanding the language of the tariff act is without exception in favor of this class of property. See also Texas v. White, 7 Wall. 700, 725, 19 L. Ed. 227, 237.

[fol. 90] We are not insensible to the force of this argument. Assuming, but not definitely deciding, that the University is a governmental instrumentality of the State, let us consider whether merchandise imported by the University is exempt from the payment of tariff duties under the Constitution by necessary implication.

It is well settled that a duty on imports is a tax on the article, which is paid by the consumer. Brown v. Maryland, 12 Wheat. 419.

If the tax involved in the case at bar were an internal-revenue tax, the result would be entirely different. In Collector v. Day, 11 Wall. 113, the court reaffirmed the holding of Chief Justice Marshall that the power to tax involves the power to destroy. There the right of the Federal Government to levy an income tax against the salary of a State judge was in question. True, the amount of the tax, about $30 a year, was not sufficient to destroy a judge as an instrumentality of a State government, but a tax might have been made so high as to destroy. His whole salary might have been taken in such taxation.

In Collector v. Day, the court said:

> The supremacy of the General Government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, can not be maintained. The two Governments are upon an equality, and the question is whether the power "to lay and collect taxes" enables the General Government to tax the salary of a judicial officer of the State, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the States.

We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved

powers of the State, disables the General Government from levying the tax, as that depends upon the express power "to lay and collect taxes," but it shows that it is an original inherent power never parted with, and in respect to which the supremacy of that Government does not exist, and is of [fol. 91] no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the General Government, stand upon as solid a ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in Dobbins v. The Commissioners of Erie from taxation by the State; for, in this respect—that is, in respect to the reserved powers—the State is as sovereign and independent as the General Government. And if the means and instrumentalities employed by that Government to carry into operation the powers granted to it are necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that Government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any Government, whose means employed in conducting its operations, if subject to the control of another and distinct Government, can exist only at the mercy of that Government. Of what avail are these means if another power may tax them at discretion?

The question is, does this principle of self-preservation in Collector v. Day, supra, apply to a tariff tax? It is undoubtedly true that the legality of a power does not depend upon the extent to which it is exercised in the particular case before the court, but upon what may be done under it.

"The constitutional validity of a law is to be tested, not by what has been done under it, but by what may, by its

[fol. 92] authority, be done." Stuart v. Palmer, 74 N. Y. 183; Gilman v. Tucker, 128 N. Y. 190.

See Chief Justice Marshall's statement to the same effect in the case of Brown v. Maryland, 12 Wheat. at page 439, wherein he said: "Questions of power do not depend on the degree to which it may be exercised."

Consequently, if this and similar tariff taxes on goods imported by a State university were raised so high as to prohibit the articles from importation, would that destroy the institution, assuming that it is a governmental instrumentality of the State? If it would, then the tariff tax is invalid. If not, then it is constitutional.

Counsel for the plaintiff contends that the power to levy such a tax is the power to prevent its use by the consumer. We admit that this is true, but if the University of Illinois were prevented entirely from making importations, would it be destroyed? We believe not. A State government cannot be destroyed by the imposition of tariff duties upon articles used for the purpose of higher education, because, even if such duties were made prohibitive, the university could get along without importing them. The existence of the States is in no way threatened by such duties. Even if the duties should be made so high as to preclude their importation, it would not result in destroying the University or seriously impairing its usefulness.

The question of interference with a State government in this case is too remote. In Railroad Co. v. Peniston, 18 Wall. 5, the Supreme Court held:

> It can not be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, coexistent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and [fol. 93] its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise.

The constitutional implication preventing the Federal Government and the State from taxing each other's agencies must receive a practical construction permitting each Government to function with a minimum of interference with the other.

In the case of Metcalf & Eddy v. Mitchell, 269 U. S. 514, the Supreme Court had under consideration a tax levy under the following circumstances: Metcalf and Eddy, the plaintiffs, were consulting engineers professionally employed to advise the State or subdivisions of the State in reference to proposed water supply and sewage disposal systems. During the year 1927 the fees received by them for these services were paid over to the firm and became a part of its income. The question was whether such income was subject to taxation under the war revenue act of 1917. It was contended that Congress had no power under the Constitution to tax the income in question for the reason that the State immunity extends to all appropriate instrumentalities which the States may select without distinction between permanent and regular officers and employees of the States. The Supreme Court said:

> In such a situation it can not be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way. * * * we do not find that it impairs in any substantial manner the ability of plaintiffs in error to discharge their obligations to the State or the ability of a State or its subdivisions to procure the services of private individuals to aid them in their undertakings. Cf. Central Pacific Railroad v. California, 162 U. S. 91, 126. We therefore conclude that the tax in No. 183 was properly assessed.

In Willcuts v. Bunn, 282 U. S. 216, the Supreme Court held:

> Before the power of the Congress to lay the excise tax in question can be denied in the view that it imposed [fol. 94] a burden upon the States' borrowing power, it must appear that the burden is real, not imaginary; substantial, not negligible.

In a recent decision, Educational Films Corp. of America v. Ward, 282 U. S. 379, at page 391, Mr. Justice Stone, speaking for the Supreme Court, said:

> This court, in drawing the line which defines the limits of the powers and immunities of State and National Governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same State. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without undue interference by the other.

It must be remembered that we are dealing here, not with an express constitutional restriction on power as we were in the Fox River Butter Co. case decided February 24, 1931, T. D. 44667, but only with an asserted implication.

The plaintiff failed to show that the University would be destroyed if it were prevented from importing merchandise, and, indeed, probably could not make such a showing. The University expends yearly about five millions of dollars. Of this amount probably not to exceed five thousand dollars are spent for merchandise produced in foreign countries, or one one-hundredth of 1 per cent. It surely will not be seriously contented that to close the door to such importations would destroy the institution, or noticeably impair its efficiency.

We therefore hold that the plaintiff herein, the University of Illinois, has no constitutional exemption from the payment of duties collected in the case at bar.

The defendant is entitled to judgment. Let judgment be entered accordingly.

Young, J.

[fol. 95] IN U. S. CUSTOMS COURT

CONCURRING OPINION

CLINE, Judge:

I concur in the conclusion reached by my associate in this case, but do not agree with his assumption that the University of Illinois is a governmental instrumentality. I believe a ruling on this question is necessary to a decision. In the case of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629, Mr. Chief Justice Marshall, distinguishing between public and private corporations, applied the following test:

Are the trustees and professors public officers, invested with any portion of *political* power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority? [Italics not quoted.]

The separate opinion of Mr. Justice Story, in the same case, stated:

Public corporations are generally esteemed such as exist for public *political* purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. [Italics not quoted.]

The broad rule enunciated in the Dartmouth College case, supra, distinguishing between public corporations—which are political in nature— and private corporations, was cited as controlling in the case of Trustees of Vincennes University v. Indiana, 14 How. 268, 14 L. ed. 416, wherein the majority opinion of the Supreme Court, speaking of the Vincennes University, held that—

This corporation had no political powers, and could in no legal sense be considered as officers of the State.

The opinion of the court in the Vincennes University case, supra, held further that although the benefits of a literary institution are "enjoyed by the public generally, • • •

this would not make it a public corporation."

[fol. 96] In the case of South Carolina v. United States, 199 U. S. 437, 50 L. ed 261, the Supreme Court of the United States, after quoting from numerous leading cases, said:

> These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on an ordinary private business.

In the South Carolina case, supra, the Supreme Court held that "license taxes charged by the Federal Government upon persons selling liquor are not invalidated by the fact that they are agents of the State, which has itself engaged in that business"; and in reaching this conclusion, the majority opinion made the following comments with respect to the payment of duties on merchandise imported by State agencies:

> Suppose a state assumes, under its police power, the control of all those matters subject to the internal revenue tax, and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a state of liquor, tobacco, etc., from a license tax, would exempt the importation of merchandise by a state from import duty. While the state might not prohibit importations, as it can the sale of liquor, by private individuals, yet, paying no import duty, it could undersell all individuals, and so monopolize the importation and sale of foreign goods.
>
> Obviously, if the power of the state is carried to the extent suggested, and with it is relief from all Federal taxation, the national government would be largely crippled in its revenues. Indeed, if all the states should concur in exercising their powers to the full extent, it would be almost impossible for the nation to collect any revenues. In other words, in this indirect way it would be within the competency of the states to practically destroy the efficiency of the national government.

[fol. 97] For the reasons stated herein, it is my opinion that the University of Illinois is not entitled to exemption from the payment of duties as an instrumentality of gov-

ernment; I therefore concur in the conclusion that judgment should be entered for the defendant.

Cline, J.

Importer	Protest
University of Illinois	235023-G/75281
	266238-G/75804
	266239-G/75825
	301714-G/76471

IN U. S. CUSTOMS COURT, THIRD DIVISION

Protest 235023-G, etc.

UNIVERSITY OF ILLINOIS

vs.

THE UNITED STATES

JUDGMENT

This case having duly come on for trial before the Third Division of the United States Customs Court, and the same having been heard and submitted for decision, and the Court, after due deliberation, having made and filed a decision herein, in favor of the defendant and against the plaintiff, directing that judgment be entered herein in accordance therewith; now in conformity with said decision,

It is hereby ordered, adjudged and decreed that judgment be entered for the defendant for the reasons stated in our decision herein.

Witness Hon. G. M. Young, Hon. G. R. Cline, Judges of the United States Customs Court, and the seal of said Court, at the City of New York, this 30th day of March, A. D. 1931.

J. W. Dale, Clerk U. S. Customs Court. (Seal.)

Indorsed: United States Court of Customs and Patent Appeals. Filed May 22, 1931. Arthur B. Shelton, Clerk.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Monday, February 29, 1932.

At a session of said court continued and held at the city f Washington, pursuant to adjournment, on this 29th day f February, A. D. 1932.

Present: The Honorable William J. Graham, Presiding udge, and the Honorables Oscar E. Bland, Charles S. Hatfield, Finis J. Garrett, and Irvine L. Lenroot, Associate udges.

The court was opened for business in due form.

* * * * * * *

Customs Appeal, No. 3441

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Appellant,
v.
THE UNITED STATES, Appellee

Said appeal came on to be heard before the court and fter hearing the arguments of counsel the cause was taken nder advisement by the court. Appellee granted leave to ile supplemental brief instanter.

* * * * * * *

(Signed) William J. Graham, Presiding Judge.

Jun. 20, 1932

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS, OCTOBER TERM, 1931

Customs Appeal No. 3441. Customs Cal. No. 43

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Appellant,
vs.
THE UNITED STATES, Appellee

GRAHAM, Presiding Judge:

This is an appeal from a judgment of the United States Customs Court holding certain laboratory equipment, im-

ported by appellant at the port of Chicago, to be used for educational purposes, dutiable as classified and assessed by the collector under various paragraphs of the Tariff Act of 1922.

Appellant filed protests against such classifications, claiming that the imported merchandise was free of duty "as being imported by an instrumentality of the government of the State of Illinois, for use in the execution of a governmental function and purpose". Appellant concedes that the merchandise is dutiable as classified unless it is entitled to free entry.

The lower court overruled the protests and entered judgment accordingly. From such judgment this appeal is taken.

The question presented is whether the Government has any constitutional right to impose the duties here involved.

Appellant's claim for free entry is based upon a claimed, implied exemption enjoyed by the State and National governments from taxation assessed by one against the other's essential agencies or instrumentalities, upon the theory that the University of Illinois is an agency of the State of Illinois engaged in the performance of governmental functions of that State wholly of a public character.

The Government, on the other hand, contends that the duty in question is a valid exercise of the taxing power of the Congress under clause 1, sec. 8, Article I of the Constitution of the United States, pursuant to which the Tariff Act of 1922 was enacted. Said clause reads as follows:

1. To lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

The Government contends that the maintenance of a university by a State is not a governmental function, but is proprietary, and that therefore, under the decision in the case of South Carolina v. United States, 199 U. S. 437, the duties in question were properly imposed. It also makes another contention, viz., that the importation of merchandise is a privilege, not a right, and that the Government may impose conditions upon its importation, such

as the payment of the duties here in question, under and by virtue of clause 3, sec. 8, Article I of the Constitution of the United States, which clause reads as follows:

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

Appellant, on the other hand, relies upon the case of McCulloch v. Maryland, 4 Wheat. 315, Collector v. Day, 11 Wall. 113, and many subsequent cases in support of its contention. It denies that the functions of the University of Illinois are such as to bring the property, devoted by it to educational uses, within the taxing power of the Federal Government.

The evidence produced upon the trial establishes that the University of Illinois was organized in 1867 by a general statute enacted by the Legislature of the State of Illinois. Said act denominated the institution as the "Illinois Industrial University." Its control was vested in a Board of Trustees, all of whom were appointed by the Governor. The full term of each trustee was fixed at six years, and all vacancies occurring were to be filled by appointment by the Governor and confirmed by the Senate. Broad powers were conferred upon the board to establish and conduct a higher institution of learning. Much subsequent legislation was enacted relative to the university. It is sufficient, for the purposes of this case, to say that, by act of the Legislature, the name of the institution was changed to "University of Illinois," and that, at the time of the importations here involved, its trustees were at stated times elected by the people of the State of Illinois, with the Governor and the Superintendent of Public Instruction as ex officio members of the board.

The board is given power to sue and be sued; all of the property pertaining to the university is held by the board in trust for the State of Illinois, and is carried upon the books as State property, being inventoried, in 1925, at $17,114,917.13; the institution is supported mainly by appropriations made by the legislature of said State, amounting to over $5,000,000 annually; the comptroller of the university reports regularly to the Governor and State Auditor. Equipment purchased for the use of the university is paid for by vouchers drawn by the Auditor of Public Ac-

counts of the State against State appropriations, and the duties involved in the case at bar were paid directly out of the Treasury of the State of Illinois.

The student body of the university was, at the time of the importations here in question, about 12,000 in number, approximately 10,000 of whom were residents of the State, 2,000 being resident elsewhere. No tuition is charged to students resident in the State of Illinois, but what is called a "service fee," amounting to about $60 annually, is paid by each student. Students from outside the State are charged, in addition to said service fee, a tuition fee of about $25 a year.

The Land Grant made by Congress in 1862 to the State of Illinois to aid colleges for the benefit of agriculture and mechanic arts was, by said State, turned over to said Board of Trustees, to be used for the benefit of the university, and, under various acts of Congress enacted since said year, donations have been made by the Federal Government in aid of the university. At the present time such donations amount to about $360,000 annually. The income from student fees is approximately $750,000 annually. The university also has certain endowments bestowed by private persons, amounting to about $400,000, from which an annual income of approximately $20,000 is derived.

Practically all funds received by the university are devoted to educational purposes in branches above the grade of the common school and high school.

The primary question presented here involves the power of the administrative officers of the United States, acting in alleged pursuance of authority expressed in an act of Congress, to assess and collect duties on goods imported by and for the use of a state or one of its governmental agencies. The question is one of vast importance and merits, and has received, the most careful consideration by counsel and the court.

In the organization of our constitutional system, many difficulties were experienced. The colonies, or States, had each developed as self contained and independent communities, with varying customs and laws. Zealous in the maintenance of their institutions, the States yielded, with caution, any exclusive rights of government to the general government. The constitutional government of the nation was adopted only because experience had demonstrated

that there must be such a general government that the people of the States might be secure in their persons and property. It was a union for defense and security.

Hence, the exclusive governmental powers given to the National Government were such as would provide for the "general defense and welfare" of all the people. These powers come from the people, not from the States. McCulloch v. Maryland, 4 Wheat. 315.

Whatever doubts may have been felt by any of those who framed the Constitution, and by the States in the ratification thereof, as to certain of the powers granted to the new government, there seems to have been no conflict of opinion as to granting to the Federal Government full and exclusive control of the external affairs of the nation. This included the rights to levy and collect imposts and duties on imports from foreign countries, and to regulate international commerce. The contemporaneous exposition of this subject by Hamilton is illuminating. The Federalist, Nos. XXXII, XXXIII, XXXIV, and XXXV..

This exclusive power has been recognized and vitalized by the courts. No more comprehensive discussion of the subject can be found than in McCulloch v. Maryland, supra. There Chief Justice Marshall set up certain milestones: "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action." "The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government." "The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."

The undivided authority of the general government over imports and import duties, and foreign commerce, if, in fact, it has ever been doubted, is confirmed by many authorities. Collector v. Day, 11 Wall. 113; Fairbank v. United States, 181 U. S. 283; Willcuts v. Bunn, 282 U. S. 216. In License Cases, 5 How. 504, it was said that the controlling and supreme power over commerce with foreign nations and the several States was undoubtedly conferred upon Congress; "and here is the limit between the

sovereign power of the State and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States" (599).

The doctrine is also stated in Gibbons v. Ogden, 9 Wheat. 1; Weston v. Charleston, 2 Pet. 448; Dobbins v. Erie Co., 16 Pet. 434; Mobile v. Kimball, 102 U. S. 691, 697; Webber v. Virginia, 103 U. S. 344, 351; Van Brocklin v. Tennessee, 117 U. S. 151; Brennan v. Titusville, 153 U. S. 289, 299; Buttfield v. Stranahan, 192 U. S. 470.

These cases announce the broad principles that the State Governments not only have no right in themselves to levy and collect import duties or to regulate foreign commerce, but that they cannot interfere with, obstruct nor question the policy of, any law which Congress may, in pursuance of its constitutional functions, enact on these subjects.

The powers to lay imposts or duties and the power to regulate commerce may and often do find expression in the same act of Congress. The statutory provision may be the combined judgment of the legislative body and may embrace objects extending beyond that of revenue. It was said in Gibbons v. Ogden, supra (p-. 199, 200), that the act of laying duties or imposts on imports or exports was, very clearly, an exercise of the taxing power. Yet Chief Justice Marshall, following this expression, as clearly announced: "It is true, that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed, with a view to revenue. * * * The idea that the same measure might, according to circumstances, be arranged with different classes of power, was no novelty to the framers of our constitution. * * * The right to regulate commerce, even by the imposition of duties, was not controverted."

From the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries, "not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power of foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude

merchandise at discretion." Brolan v. United States, 236 U. S. 216.

An additional duty fixed upon goods coming from east of the Cape of Good Hope was held to be valid as a regulation of commerce. Russell v. Williams, 106 U. S. 623. In the more recent case of Hampton v. United States, 276 U. S. 394, the Supreme Court was of the opinion that a customs duty, although imposed in pursuance of an expressed policy of protection to domesticate industries, was valid and enforcible. To like effect was Arnold v. United States, 147 U. S. 494, 497. The power to regulate commerce, "like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Gibbons v. Ogden, supra (195).

It has repeatedly been announced that the Congress may place an embargo, total or partial, upon importations from foreign countries, under the exercise of the constitutional powers to regulate commerce. United States v. Marigold, 9 How. 559; The Abby Dodge, 223 U. S. 166; Weber v. Freed, 239 U. S. 325; Hammer v. Dagenhart, 247 U. S. 251. As Congress has the right to absolutely prohibit importation, it also has plenary power to prescribe the conditions upon which the importation may be made. Sang Lung v. Jackson, 85 Fed. 502; United States v. American Exp. Co., 177 Fed. 735, 738. "Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare. They have been at all times often specific. They have sometimes been discriminatory, particularly when deemed necessary by reason of the tariff legislation of other countries." Knowlton v. Moore, 178 U. S. 41, 88.

We come, therefore, to this conclusion, based on reason and on the conclusive authorities cited, that it was within the constitutional power of the Congress to fix a rate of import duties to be paid when the articles imported here entered the commerce of the country. This it might do for purposes of raising revenue; it might do it as the result of a national policy of protection to the industries of the country; it might do it as a regulation of foreign commerce; for all these powers were within its exclusive power. What the purpose was, so long as it was fairly within the sphere of its constitutional functions, the appellant or the State

government, of which it claims to be a part, cannot question. Assume that the statute before us, instead of fixing a certain rate of duty, had declared a total embargo upon the importation of such articles. Could the State have ignored this embargo and imported the articles? We dare say there are none who will so contend. If, then, its importation may be prohibited, may it not, by the same power, be conditionally admitted? Upon what theory may a State contend that what the general government may do in whole, as a matter of national policy, it may not do in part?

Here, if there were otherwise question as to the purposes of Congress in enacting the statute before us, we need have no doubt. The preamble to the Tariff Act of 1922 is: "An Act to *provide revenue,* to *regulate commerce* with foreign countries, to *encourage the industries* of the United States, and for *other purposes.*" (Italics ours.)

The appellant has treated this question as if the right to import were undisputed, and the imposition of a tax was upon not only the exercise of a necessary governmental agency, but upon the exercise of a right which was absolute. But this view is fallacious. No individual has a vested right to import articles from a foreign country. His right to do this must depend upon the authority to do so conferred by act of Congress and upon the terms so fixed. Buttfield v. Stranahan, supra.

Nor, in reason, can it be seen how an agency of a State stands in any different position than an individual, in this respect. The appellant had the right to import, but its right was conditional. It will be borne in mind that the goods imported in the case at bar were foreign goods and did not become merged into the commerce of the country until the duties were levied and paid. Sonneborn Bros. v. Cureton, 262 U. S. 506, 509; Faber, Coe & Gregg v. United States, 19 C. C. P. A. (Customs) —, T. D. —. So, a tax upon the imported goods, while it remains a part of foreign commerce and is not introduced into the general mass of property in a State, differs greatly from a tax upon the property after it has been imported. License Cases, supra. (575.)

These observations seem, legitimately, to lead us to the conclusion that the duties herein were properly imposed. The appellant, however, vigorously contends that, under a well-considered line of authorities, the State of Illinois and

its various governmental agencies, are exempt from the payment of these duties. This contention rests upon two premises: First, that an impost or duty is a tax. Second, that the taxing power of the Government may not be applied to the agencies, instrumentalities and property of the State.

In support of the first premise, appellant relies upon Brown v. Maryland, 12 Wheat. 419, 439, in which the Supreme Court announced the principle: "A duty on imports is a tax on the article which is paid by the consumer."

The second premise is claimed to be sustained by a line of cases beginning with McCulloch v. Maryland, supra. In that case, in which the State of Maryland attempted to extend her taxing powers to national banks, the great chief justice announced the essential doctrine that each government, state and national, must continue to exist and perform its full functions, unimpeded and unobstructed by the other, and that neither might destroy the functions or agencies of government of the other, by taxation, or otherwise. The Supreme Court, in the case cited, did not alone refer to taxation—it referred to any means by which one government might weaken or destroy the other, in the performance of its legal or constitutional functions.

The principle thus announced has been sustained and developed by many cases: Weston v. Charleston, 2 Pet. 448; Dobbins v. Erie Co., 16 Pet. 434; United States v. Ry. Co., 17 Wall. 322; Ry. Co. v. Peniston, 18 Wall. 1, 30; Ohio v. Thomas, 173 U. S. 276; South Carolina v. United States, 199 U. S. 437; Flint v. Stone, 220 U. S. 107; Johnson v. Maryland, 254 U. S. 51; Metcalf v. Mitchell, 269 U. S. 514; Panhandle Oil Co. v. Knox, 277 U. S. 218; Indian Motocycle Co. v. United States, 283 U. S. 570.

The maintenance of our dual form of government has made necessary such a rule. Otherwise, such a system could not long exist. "But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the Federal Government must exercise its authority within the territorial limits of the States; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from

undue interference by the other." Metcalf et al. v. Mitchell, 269 U. S. 514, 523.

The same idea was expressed in Educational Films v. Ward, 282 U. S. 379, and Brown v. Houston, 114 U. S. 622, 630.

In the recent unreported case of Fox Film Corp. v. Doyal, decided May 16, 1932, Chief Justice Hughes, speaking for the court, said: "The principle of the immunity from state taxation of instrumentalities of the Federal Government, and of the corresponding immunity of State instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government (McCulloch v. Maryland, 4 Wheat. 316, 436), and the immunity does not extend 'to anything lying outside or beyond governmental functions and their exertions'."

In the later cases since Brown v. Maryland, supra, the tax involved has been such a tax or excise as was within the power of either government to impose. There were no questions of import duties, or regulation of commerce, or foreign relations, exclusive powers of the National Government, involved. One government was so functioning as to weaken or impair the other, in a field common to both, and this may not be done. If, however, in the operation of a national policy, in pursuance to a constitutional power which is exclusive, the revenues of a State are incidentally decreased, must the interests of the State not be subservient to the general welfare of all? The operation of national navigation, immigration or tariff laws may discriminate, in their effect, between communities and States, because of their diverse industries and conditions. Thus, the revenues of the State may be impaired. But does this render the laws unconstitutional? A State may desire to import articles from foreign countries. If it does so, having entered a field entirely within the control of the National Government, it must assent to and conform with every constitutional provision which the National Government has made concerning the same. For these reasons, we are of opinion that the cases heretofore referred to in this branch of the case, are not decisive of the point here involved.

To concede that the State of Illinois, or any State, might disregard and nullify, when it considers its own interests

injuriously affected, provisions of law exclusively within the control of the National Government, is to weaken and decrease the federal revenues, to nullify, to an essential degree, its power to regulate international commerce, and to set at naught any other policy which the Congress may have had in mind in enacting the legislation, affecting the welfare of all the people of the Union. In forming our national compact, the Constitution, the people of all the States freely and voluntarily consigned these governmental rights into the hands of the general government. Whatever rights the States had in this respect were then yielded up, and they cannot now assert them.

For about one hundred and fifty years of national existence, there has heretofore been no challenge of this power. The administrative officers of both States and nation have proceeded upon the theory that such duties should be paid by anyone, whether individual citizen or governmental unit, not exempted by the acts of Congress from such payment. The Congress assumed it had such power and in the tariff act of July 24, 1897, (30 Stat. 203) par. 702, when it was thought desirable to permit free entry of certain goods by a State, it so provided. Such provisions have continued in succeeding acts; including the Tariff Act of 1922, par. 1706, (42 Stat. 934). Certainly, such a long continued administrative, executive, and legislative construction of these Constitutional provisions by both States and Nation, are entitled to great weight in our determination of this matter. Hampton & Co. v. United States, supra.

While perhaps unnecessary to a decision of the case, another point may be adverted to. The activities in which the State Governments may legally engage are without number. They may conduct the business of grain elevators, banks and building associations. Green v. Frazier, 253 U. S. 233. Cities which are units of the State Government, (United States v. Railway Co., supra), may conduct fuel yards, (Jones v. Portland, 245 U. S. 217), or public utilities, Springfield G. & E. Co. v. Springfield, 257 U. S. 66. It is true that in S. Carolina v. United States, supra, it was held that the agencies of a State were exempted from a federal tax only when such agencies were performing the ordinary functions of government, and that dispensing alcoholic liquors was not such an ordinary function.

How far the courts might be called upon to go in holding importation for the various legal activities of a State to be in discharge of its ordinary functions, is uncertain. One fact, however, is obvious: The States, with their various lesser governmental units, cities, villages, counties, drainage, sanitary and reclamation districts, school boards, road districts, and the like, have myriad activities unknown to the framers of the constitution. Such functions as the building of roads and schools, the employment of convicts, the building of canals, sewers, harbors and levees, are certainly all within the exercise of the ordinary functions of the State. May concrete and stone and building material, road material, materials to employ the labor of convicts, and the like, be imported free of duty by a State, when the individual purchaser must pay the additional price due to the imposition of a duty? To so hold will lead to the result so aptly stated in South Carolina v. United States, supra:

Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.

Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government.

We are of opinion that the appellant, whether it be considered a governmental agency of the State of Illinois or not, was not exempt from the payment of the duties imposed by the collectors on the imported goods in the case at bar. This being true, a further consideration of the

governmental status of the appellant is unnecessary to a disposition of the case.

The judgment of the United States Customs Court is affirmed.

Affirmed.

Jun. 20, 1932

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS, OCTOBER TERM, 1931

Customs Appeal No. 3441. Customs Calendar No. 43

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Appellant,

v.

THE UNITED STATES, Appellee

BLAND, J., concurring:

I, like my associates, Presiding Judge Graham and Judge Hatfield, conclude that the judgment below must be affirmed, and in this result I concur. Since some of the chief reasons which bring me to this conclusion have not been sufficiently emphasized in the foregoing opinion, and in view of the importance of the case, I will state my position as briefly as possible.

Upon the record in this case two major questions are presented: First. Is it shown by this record that the University of Illinois is an agency of the State of Illinois and as such engaged in performing a governmental function when it imported laboratory equipment for use in its educational work? Second. If it is performing a governmental function, can the Federal Government constitutionally levy an import duty upon such importation?

Since this case was argued in this court, the Supreme Court of the United States in Burnet v. Coronado Oil and Gas Co., 284 U. S. —, held that the assessment by the Commissioner of Internal Revenue of income and excess profit taxes upon the net income of the lessee of public school lands of Oklahoma, which income arose from oil produced

on such lands, violated the Constitutional rights of the State of Oklahoma. A majority of the court held that when the State of Oklahoma leased her public school lands for the benefit of the public schools, she exercised a function strictly governmental in character. The decision is based upon the authority of Gillespie v. Oklahoma, 257 U. S. 501, which held that the State of Oklahoma had no right to tax income derived by a lessee of Indian land from sales of oil and gas received under the lease. While the decision in the Burnet case does not expressly state that the activity of a State in connection with all kinds of education is a governmental function, it does hold that the maintenance of public schools is the exercise of such a function.

If I were to pass upon the question as to whether or not the State's maintenance of a university was strictly the exercise of a governmental function, I might regard Burnet, supra, and other cases relied upon by appellant, as very persuasive authority in favor of the affirmative of this proposition. The facts in this record, however, are quite different from those in the Burnet case. Whether the difference in the facts of the case at bar and those of the Burnet case might properly be the basis for distinguishing this case from the Burnet case, I do not feel called upon to determine. The exact question is not whether Illinois is performing a governmental function in the maintenance of a university, but whether it is performing a governmental function when it imports foreign merchandise to be used by such university in connection with education. In view of my conclusion on the second question, it will not be necessary for me to discuss the first.

As to the second question, I am of the opinion that the Federal Government has the constitutional authority to levy import duties, such as are provided for in the Tariff Act of 1922, upon any importation imported by the State of Illinois, regardless of the use for which the merchandise is intended.

The representatives of the States in the Constitutional Convention, in order to form the character of union desired, realized that it was necessary for the States to surrender to the Federal Government certain powers which they had enjoyed. Some of such powers were surrendered absolutely, such as the control of patents, currency, naturalization,

bankruptcy, etc. Certain other powers were given the Federal Government, but not to the exclusion of the same powers being exercised by the States. In numerous instances, they vested in the Federal Government exclusive powers to do things which could not be properly done if both sovereignties operated in the same field. One of the powers given to the Federal Government was that of laying and collecting taxes, but the States did not give it the exclusive right in taxation matters. The Constitution does not say it, but it is well established that the States could not have intended to surrender their taxing powers entirely, because to do so would have been to deprive themselves of the ability to maintain government. Where the same powers are exercised by both sovereignties, controversy as to the limits of each sovereignty's power would necessarily arise.

The courts early held that the Constitution must be held to be a bar to the sovereignty of one government taxing the necessary and strictly governmental functions of the other, although no express language to that effect is found in the instrument. To hold otherwise would have left one sovereignty free to unduly burden and handicap the other in the exercise of the functions which each was to have, and lead to a result which was destructive of the purposes which the fundamental law sought to accomplish.

Prior to the ratification of the Constitution, the States, while acting independently, levied and collected import duties. By clause 3, section 8, article I of the Constitution, they surrendered to the Federal Government the right to regulate commerce with foreign nations and among the other states, and by clause 1 of the same section and article, empowered the Federal Government to lay and collect duties and imposts. As far as we are advised, it has not been contended that the States intended to reserve to themselves any part of the duty of regulating commerce with foreign nations or among the several States. The very nature of these duties suggests that dual control in these particulars was impracticable. Dual power of levying taxes in the States, although presenting vexatious problems as to the scope of authority of the respective sovereignties must, in the very nature of things, have been within the contemplation of the framers. It is to be observed, however, that the right to lay and collect taxes by the Federal Government is granted in the same clause which granted the power

to lay and collect duties and imposts, and that the power to regulate commerce between the States is granted in the same clause as the power to regulate commerce with foreign nations, but this fact does not compel the conclusion that as far as the question involved here is concerned the same limitations as to each of the powers must apply.

The Supreme Court of the United States in Brown v. Maryland, 12 Wheat. 419, 436, 439, held that the tariff duty was the levying of a tax upon the consumer of the imported article, and it held in substance in Adair v. United States, 208 U. S. 161, Gibbons v. Ogden, 9 Wheat. 1, 196, and the Lottery Case, 188 U. S. 321, 353, that under the power to regulate interstate commerce, the Federal Government could not exercise this power in violation of the fundamental rights of the States secured by the provisions of the Constitution. The soundness of these decisions, when applied to the facts in those cases, does not admit of doubt. Of course the Federal Government, under the guise of regulating interstate commerce, could not tax the commerce of a State out of existence, and the same principle would apply to the levying of a protective tariff duty in regulating foreign commerce, if it so burdened the States as to defeat the intent of the framers of the Constitution. Its power to regulate interstate commerce could not be exercised in such a way as to destroy the State's fundamental rights which it had not surrendered to the Federal Government. And just here lies the distinction between these cases and the case at bar.

How could the Federal Government regulate foreign commerce by the imposition of protective tariff duties or by embargo, and thereby control, in many instances, the volume of importations, if, at the same time, the State had the right to import for its own use, upon wholly different terms, the same merchandise. It is unthinkable that the framers of the Constitution ever contemplated that the duty of regulating foreign commerce was a joint function of the States and the Union, or that the duties of the Federal Government in this respect could be carried out if interference by the States in the same field of action was tolerated.

The Tariff Act of 1922, in its preamble, states:

An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes.

Most of its dutiable provisions are definitely aimed at protecting American industries through the regulation of foreign commerce. Furthermore, the act contains the flexible tariff provision which provides a special system of machinery for equalizing production costs without further investigation by Congress. It also contains the special proviso (section 316) for embargo and special duties which apply in case of unfair acts in the importation of merchandise. The act, therefore, is far more than a mere revenue act.

Regardless of whether the levying of a tariff duty is the laying of a tax upon the consumer of the imported article, as was held in Brown v. Maryland, supra, it is nevertheless in part the result of the exercise of the Federal Government of its power to regulate foreign commerce. See Hampton, Jr., v. United States, 276 U. S. 394. Since it is the exercise in part at least of the function of the Federal Government in regulating foreign commerce, and even though it be a tax, it is not such a tax as the Federal Government is, by the Constitution, barred from imposing upon the importer of goods.

That the imposition of duty on the particular item of importation at bar is in part the exercise by the Federal Government of its foreign commerce regulating power, is too obvious to require extended discussion here. The context of the act under consideration and the legislative history of the dutiable status of merchandise of this character unquestionably suggests that Congress sought by the levy of this particular duty to regulate in a measure the trade in this commodity with foreign nations.

It was within the intent of the framers of the Constitution that one means of regulating the foreign commerce was the imposition of protective duties. James Madison, ofttimes styled the father of the Constitution, and who probably, during his lifetime, was more familiar with the motives prompting the actions of the framers than any other human being, was unqualifiedly of the opinion that the levying of a protective duty was the exercise of the Constitutional power granted the Congress to regulate foreign commerce. In his letter of September 18, 1828, to Joseph C. Cabell, he emphatically expresses this view, giving his reasons therefor, at great length and with much clearness. This letter may be found at page 9590 of the Congressional

Record, Vol. 72, part 9, 71st Congress, Second Session. Among the many reasons assigned for concluding that the framers of the Constitution by the provision "the power to regulate commerce with foreign nations," had in mind the imposition of duties which equalized cost of production and thus fostered domestic manufactures, were the following:

The Constitution vests in Congress expressly "the power to lay and collect taxes, duties, imposts, and excises," and "the power to regulate trade."

That the former power, if not particularly expressed, would have been included in the latter as one of the objects of a general power to regulate trade is not necessarily impugned by its being so expressed. Examples of this sort can not sometimes be easily avoided and are to be seen elsewhere in the Constitution. * * *

Nor can it be inferred that a power to regulate trade does not involve a power to tax it, from the distinction made in the original controversy with Great Britain, between a power to regulate trade with the Colonies and a power to tax them. * * *

* * * * * * *

8. That the encouragement of manufactures was an object of the power to regulate trade is proved by the use made of the power for that object in the first session of the First Congress under the Constitution, when among the Members present were so many who had been members of the Federal convention which framed the Constitution, and of the State conventions which ratified it; each of these classes consisting also of members who had opposed and who had espoused the Constitution in its actual form. It does not appear from the printed proceedings of Congress on that occasion that the power was denied by any of them. And it may be remarked that Members from Virginia in particular, as well of the anti-Federal as the Federal Party, the names then distinguishing those who had opposed and those who had approved the Constitution, did not hesitate to propose duties, and to suggest even prohibitions, in favor of several articles of her production. By one a duty was proposed on mineral coal in favor of the Virginia coal pits, by another a duty on hemp was proposed to encourage the

growth of that article, and by a third a prohibition even of foreign beef was suggested as a measure of sound policy. (See Lloyd's Debates.)

In South Carolina v. United States, 199 U. S. 437, in discussing the powers of the Federal and State sovereignties to impose taxes, the Supreme Court of the United States said:

To determine the extent of the grants of power we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants.

It was there further said that:

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now.

Since it is clear that the States surrendered to the Federal Government the exclusive right to regulate foreign commerce by the imposition of import duties, it is unthinkable that they could have intended that the States themselves might import goods of every kind and character used in performing State functions and thereby render it impossible for the Federal Government to successfully and adequately regulate such commerce, and especially to regulate it so as to comply with the mandate "All duties, imposts and excises shall be uniform throughout the United States."

The fact is conceded, and it is certainly not contestable, that the right of a State to be immune from Federal taxation carries with it the immunity of all of its subdivisions—its counties, towns, cities, and all of their respective agencies, which perform a governmental function. Under the contention of appellant, all of these agencies would have the right to import free of duty all supplies of every kind and character used in building courthouses, jails, asylums, schools, roads, bridges, etc. They would have the right to import furnishings, books, clothing, tools and articles too numerous to enumerate as an incident of performing such governmental functions. Such enormous volume of importations by the States and their subdivisions would be

possible under such circumstances as would render impossible the successful uniform regulation by the Federal Government. The framers of the Constitution could not have reasonably intended such a power being reserved to the States.

In Willcuts v. Bun, 282 U. S. 216, the court said:

Before the power of the Congress to lay the excise tax in question can be denied in the view that it imposes a burden upon the States' borrowing power, it must appear that the burden is real, not imaginary; substantial, not negligible.

The court there referred to an excise tax, but obviously the framers of the Constitution, in providing that the Federal Government might levy import duties in its regulation of foreign commerce, could have no occasion to levy a duty which would result in burdening the State in the performance of its governmental functions. I do not think a customs duty nor an embargo, if applied in the regulation of foreign commerce of the nation could be or does result in such a burden.

Moreover, this is not a case where the Federal Government goes into the State and levies a tax upon some State governmental activity in such a way that if carried to the extreme it would paralyze the arm of the State Government. On the contrary, it is a case where the State goes outside the United States and buys merchandise and subjects it to laws wholly Federal in character. In bringing it into the commerce of the United States, the State comes in contact with and subjects itself to the Federal Government's laws regulating foreign commerce to which the State assented in the Constitutional convention.

The Federal Government, for more than 150 years, has exercised the exclusive power of regulating the importation of foreign articles, whether imported by a State or otherwise, and as far as I am able to learn, this is the first time in the nation's history that any State has presented for judicial decision the question of its right to import free of duty merchandise made dutiable by an act of Congress. My conclusion that the State has no such right is for the most part based on the consideration of the fact that the existence of such a right in the State is so wholly inconsistent and destructive of other rights granted to the

Federal Government as to be not within the contemplation of the framers of the Constitution.

It is admitted by the appellant that if its claim of free importation is not sustained, that the goods were properly classified by the collector.

The judgment of the United States Customs Court, overruling the protest and holding said merchandise dutiable as assessed, was proper.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS, OCTOBER TERM, 1931

Customs Calendar No. 43. Customs Appeal No. 3441

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Appellant,

v.

THE UNITED STATES, Appellee

GARRETT and LENROOT, Judges, dissenting (opinion by Lenroot):

We are compelled to dissent from the conclusion reached by the majority in this case as we are of the opinion that the protests of appellant should be sustained.

The case is of such importance that we feel constrained to express our views at length, not only with respect to those questions upon which we disagree with the views of the majority, but also with respect to those upon which we are in accord with the majority opinion.

Upon the state of facts set out in the majority opinion, two major questions are presented for determination:

1. Is the University of Illinois, an agency of the State of Illinois performing governmental functions; and, if so, are such functions of such a nature as to exempt property acquired by it, for the purpose of carrying on the educational activities of the university, from the imposition of taxes or duties imposed by Congress by virtue of clause 1, sec. 8, Article I of the Constitution of the United States, quoted in the majority opinion?

If the answer to the first question be in the affirmative,

2. May the classification and assessment by the collector of the merchandise here involved be sustained as an exercise of power by Congress under clause 3, sec. 8, Article I of the Federal Constitution, also quoted in the majority opinion?

The first question involves a consideration of the relative powers of the Federal Government and the State Government of Illinois with respect to the taxation by one of the property of the other.

That the University of Illinois is an instrumentality of the State of Illinois, performing governmental functions of that State, is established by the evidence in the case. It was created by a public law of the State of Illinois; its trustees are elected by the people of Illinois. The Governor and the Superintendent of Public Instruction are ex officio members of the Board of Trustees. It is controlled wholly by the legislature of the State and is supported mainly by legislative appropriations out of general tax levies by that State. Property acquired for the use of the university is paid for directly out of the Treasury of the State of Illinois. It is engaged in no activity primarily for profit, and all funds received by the university are devoted to instructional and educational purposes.

In the case of Thomas v. Industrial University [now the University of Illinois], 71 Ill. 310, 312, the court said:

Is this university, then, a State institution, or is it a private corporation? It has been largely endowed with funds by the State, received by donation for the purpose, from the general government. The act by which it is organized places its control under the authority of the State. The Governor is required to appoint, and the Senate to confirm, the trustees who control the institution, except the Governor and Superintendent of Public Instruction are made ex officio members of the board of trustees, for the management of the fund and the government of the university. There is nothing in the act from which it can be inferred that this institution was, in any respect, to be a private corporation, either in whole or in part. * * * Private individuals have no interest in or control over it, but it is, in every sense of the term, a State institution. It, with its property, management and control, is entirely

under the power of the General Assembly, and this has been recognized by the General Assembly by making subsequent appropriations for the erection of buildings, and to defray expenses, and by expressly prohibiting the board of trustees from obligating the State for the payment of any sum of money in excess of the appropriations thus made. Sec. 3, acts 1871-2, p. 143.

The character of the University of Tennessee was involved in the case of University of Tennessee v. People's Bank, 157 Tenn. 87, 6 S. W. (2d) 328. In this case the court in its opinion said:

We are of the opinion that the state, and the public represented by it, must be considered as the owner of property held by the University, and that the sovereign character of the state's ownership is not changed by the creation of the corporation as a convenient means through which the state exercises the strictly governmental function of educating the youth among its citizens. We are not able to find that the state has lost or divested itself of any element of sovereignty in the creation of this corporation which is subject to the will of the legislative branch of the state government in every particular, and the only purpose of which is to perform a governmental function.

In the leading case of Dartmouth College v. Woodward, 4 Wheat. 517, in considering the character of the charter of incorporation of Dartmouth College, the court said:

If the Act of Incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the Legislature of the State may act, according to its own judgment, unrestrained by any limitation of its power, imposed by the Constitution of the United States.

In the separate opinion of Mr. Justice Story in said case, the following is found:

* * * strictly speaking, public corporations are such only as are founded by the government, for public purposes, where the whole interests belong to the government. * * *

In the case at bar, the University of Illinois is an instrumentality of the State of Illinois, founded by that State for public purposes, and "the whole interests belong to," and its activities are under the control of, said State.

This fact alone, however, does not render the University of Illinois exempt from taxation by the Federal Government under said clause 1, sec. 8, Article I of the Federal Constitution, for the law is that an instrumentality of a State, even though performing only functions directed by the State, is not exempt from Federal taxation unless its activities are, as sometimes stated, of a strictly governmental character, as distinguished from those performed in the carrying on of an ordinary private business. South Carolina v. United States, 199 U. S. 437.

It is well established that the States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operation of the constitutional powers of Congress to carry into execution the powers vested in the general government. McCulloch v. Maryland, 4 Wheat. 315.

It is equally well established that the Federal Government has no power to tax the means and instrumentalities of the States engaged in the performance of essential governmental functions. Collector v. Day, 11 Wall. 113.

The case last cited involved the right of the Federal Government to impose a tax upon the salary of a judicial officer of the State of Massachusetts. It was held that no such power existed. In its opinion the court said:

* * * The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of

another government, which power acknowledges no limits but the will of the legislative body imposing the tax. * * *

The court said further:

* * * It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

In the case of Veazie Bank v. Fenno, 8 Wall. 533, a Federal tax upon the circulating notes of state banks was sustained. In its opinion the court, in discussing the nature of the tax there in question, said:

* * * It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

The principle declared in the cases above cited has been followed in many cases decided by the Supreme Court of the United States. One of the most recent of such decisions is the case of Willcuts v. Bunn, 282 U. S. 216. In the opinion in this case, written by Chief Justice Hughes, it is stated:

* * * The familiar aphorism is "that as the means and instrumentalities employed by the General Government to

carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the General Government." Ambrosini v. United States, 187 U. S. 1, 7. And a tax upon the obligations of a State or of its political subdivisions falls within the constitutional prohibition as a tax upon the exercise of the borrowing power of the State. Pollock v. Farmers' Loan & Trust Company, 157 U. S. 429, 584-586; id., 158 U. S. 601, 618; National Life Insurance Company v. United States, 277 U. S. 508, 521.

The limitation of this principle to its appropriate applications is also important to the successful working of our governmental system. The power to tax is no less essential than the power to borrow money, and, in preserving the latter, it is not necessary to cripple the former by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and *where no direct burden is laid upon the governmental instrumentality,* and there is only a remote, if any, influence upon the exercise of the functions of government. * * * (Italics ours.)

In the case of South Carolina v. United States, supra, there was presented to the Supreme Court of the United States for the first time the question of whether every function which a State may properly exercise, or activity in which it may engage, is immune from the Federal taxing power.

In that case it was held that a State may control the sale of liquor by the dispensary system, but when it does so it engages in ordinary private business which is not, by the mere fact that it is being conducted by a State, exempt from the taxing power of the national government. In the opinion, however, the observation was made that the tax there in question was not a tax upon property of the State.

After reviewing a large number of cases upon the subject of the exemption of the national government from taxation by the States, and the exemption of the States from taxation by the Federal Government, the court said:

These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental

character, and does not extend to those which are used by the State in the carrying on of an ordinary private business.

The court concluded its opinion in said case with the following:

Now, if it be well established, as these authorities say, that there is a clear distinction as respects the responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation.

In arriving at its conclusion in said case, the court adverted to a rule of construction that is material in the case at bar. In its examination of the powers granted in the Federal Constitution, it said:

To determine the extent of the grants of power we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants.

The court further said:

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and

meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded. * * *

In the case of Metcalf & Eddy v. Mitchell, 269 U. S. 514, speaking of the question of immunity from taxation, the court said:

While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power.

In the case of Panhandle Oil Co. v. Knox, 277 U. S. 218, the power of the State of Mississippi to tax sales of gasoline to the United States for the use of its Coast Guard fleet, in service in the Gulf of Mexico, and for its Veterans Hospital at Gulfport, was involved. It was held that such taxes, as applied to such sales, were void. In its opinion the court said:

* * * The States may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions. * * *

In the case of Indian Motocycle Co. v. United States, 283 U. S. 570, it was held that the sale of motorcycles to a State agency, such as a municipal corporation, for use in its police service, is not subject to taxation by the United States. In its opinion, after stating the principle of immunity from taxation involved, the court said:

Of course, the reasons underlying the principle mark the limits of its range. Thus, as to persons or corporations which serve as agencies of government, national or state,

and also have private property or engage on their own account in business for gain, it is well settled that the principle does not extend to their private property or private business, but only to their operations or acts as such agencies; and, in harmony with this view, it also has been held where a State departs from her usual governmental functions and "engages in a business which is of a private nature," no immunity arises in respect of her own or her agents' operations in that business. While these decisions show that the immunity does not extend to anything lying outside or beyond governmental functions and their exertion, other decisions to which we shall now refer show that it does extend to all that lies within that field.

From the foregoing cited cases it is apparent that upon this branch of the case the question for determination is whether public education, conducted through the instrumentality of a university wholly under the control of a State, supported in the main out of the public treasury, and whose property is owned by the State, is such an activity as should be deemed proprietary and therefore not immune from taxation by the Federal Government, or governmental, as distinguished from proprietary, and therefore immune from such taxation.

So far as we are able to discover, the United States Customs Court is the first court to pass directly upon this question. University of Illinois et al. v. United States, T. D. 43023, 54 T. D. 319. It was there held that the University of Illinois was not an instrumentality of the State of Illinois of strictly governmental character, and therefore was not exempt from taxation by the Federal Government. However, in the case at bar, the lower court assumed, without definitely deciding, that the University of Illinois was a governmental instrumentality of the State of Illinois, but overruled appellant's protests upon other grounds which we shall later advert to.

It will be noted that in the case of South Carolina v. United States, supra, the court said that, in determining the powers granted in the Federal Constitution, it is relevant to inquire what the men who framed and adopted the Constitution must have understood to be the meaning and scope of the grants.

It is a matter of history that Harvard University was founded in 1650. Its board of overseers was at first jointly

representative of State and Church. Until 1865 it was regarded as a State institution, when by an act of the Massachusetts Legislature the connection with the State was severed. Encyclopedia Britannica, (14th ed.), vol. 2, p. 230. We do not intimate that, at the time of the adoption of the Federal Constitution, Harvard University was in fact a public corporation, performing governmental functions of the State of Massachusetts, but refer to it only for the purpose of showing that at that time the conduct of higher education was regarded by the State of Massachusetts as one of the prerogatives of that State, acting in its sovereign capacity.

In the 1777 Constitution of the State of Vermont it was provided by section 40 as follows:

Section XL. A school or schools shall be established in each town, by the legislature, for the convenient instruction of youth, with such salaries to the masters, paid by each town; making proper use of school lands in each town, thereby to enable them to instruct youth at low prices. One grammar school in each county, and one university in this State, ought to be established by direction of the General Assembly.

It is an historical fact that, prior to the adoption of our Federal Constitution, many of the States had established public schools at the expense of local taxing districts.

Therefore, applying the test suggested in South Carolina v. United States, supra, we cannot say that the policy of education at public expense was an activity not known to the framers of the Constitution.

Furthermore, in the Ordinance of 1787, for the government of the Northwest Territory, out of which the State of Illinois was later carved, there is found in Article III the following declaration:

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, and the means of education shall forever be encouraged. * * *

It also appears that in the enabling act for Illinois, enacted by Congress in 1818, it was provided that three per cent of the net proceeds of the public lands within the State of Illinois should be appropriated by the Legislature

of the State "for the encouragement of learning, of which *one-sixth part shall be exclusively bestowed upon a college or university.*" (Italics ours.)

In this connection it is also pertinent to note the familiar passage in Washington's Farewell Message, wherein he said:

> Promote, then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.

It is true that there is no mention of education in the Federal Constitution. The reason therefor, no doubt, was that its framers deemed that education, insofar as undertaken by public authority, was a function of the States and was one of those powers reserved to the States.

Certain it is that there is no grant of power in the Federal Constitution, express or implied, to Congress to control or in any way regulate education within the States, but this power has, from the time of the adoption of the Constitution, been regarded as within the sovereign power of the States, subject only to such personal and property rights of the citizen as are protected by the Federal Constitution.

We do not think that in this day it can be said that the conduct of an educational institution by a State is not a legitimate governmental function, nor do we believe that it is a function which should be classed as proprietary and of the general class held subject to taxation by the Federal Government in the case of South Carolina v. United States, supra.

In the brief of the Government it is contended that:

> A strictly governmental function is one that can only be performed by a State, such as the maintenance of a judicial system, as contradistinguished from a proprietary function which may be performed either by a State or by private persons or corporations, such as the maintenance of institutions of higher education, or a system for dispensing intoxicating liquors. Note Flint v. Stone, 220, U. S. 107, 172.

As a matter of fact, of which this Court will no doubt take judicial notice, the best, and no doubt the majority, of

institutions of higher education are maintained independently of any State, for example, Harvard, Yale, Princeton, Columbia, Johns Hopkins, Georgetown and George Washington Universities, and literally hundreds of other well known and renowned institutions of higher education too numerous to mention within the limited confines of this brief.

To assert that the maintenance by a State of an institution of higher education is a necessary adjunct to the existence of a State, desirable as it may be, is so obviously absurd as to require no further argument. Every State institution of higher education could be closed today without in the slightest degree endangering the sovereignty of a single State. Closing of such State-maintained institutions might inconvenience certain citizens of the respective States, and be unfortunate, but the State Governments would continue to function, and their sovereignty would remain unimpaired.

Said case of Flint v. Stone, 220 U. S. 107, relied upon by the Government to support its contention above quoted, does not even intimate that a strictly governmental function is one which can be exercised by a State only. In the opinion in that case it is stated:

* * * It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, *and to employ all necessary agencies for legitimate purposes of state government*, are not proper subjects of the taxing power of Congress. * * * (Italics ours.)

It is further stated in the opinion that:

In this connection South Carolina v. United States, 199 U. S. 437, 461, is important. In that case it was held that the agents of the state government, carrying on the business of selling liquor under state authority, were liable to pay the internal revenue tax imposed by the Federal Government. In the opinion previous cases in this court were reviewed, and the rule to be deduced therefrom stated to be that the exemption of state agencies and instrumentalities from national taxation was limited to those of a strictly

governmental character, and did not extend to those used by the State in carrying on business of a private charcter.

We think the words "strictly governmental", as used by the Supreme Court, do not mean exclusively governmental, as contended by the Government. If the Government be right in its contention, then many of the activities of the Federal Government are not "strictly governmental", but are subject to taxation by the States. We have a Bureau of Fisheries, and Government property is located in various States used for the propagation of fish. If the measuring rule applied by the Government in the case at bar to education be also applied to the Bureau of Fisheries, it must follow that the property of the United States, used for the propagation of fish, is not used in the performance of a "strictly governmental" function, and may be taxed by the States. Following the argument in the Government's brief, and substituting "fish hatcheries" for the words "an institution of higher education", and the words "Federal Government" for the words "a State", this paragraph of the Government's brief would read:

To assert that the maintenance by the Federal Government of fish hatcheries is a necessary adjunct to the existence of the Federal Government, desirable as it may be, is so obviously absurd as to require no further argument. Every fish hatchery of the Federal Government could be closed today without in the slightest degree endangering the sovereignty of the Federal Government. * * *

The same observation may be made as to most of the activities of the Department of Agriculture, the Department of Commerce, the Department of Labor and many of the independent establishments of the Government. In fact, most of the bureaus in these departments could be abolished "without in the slightest degree endangering the sovereignty" of the Federal Government.

Should any State attempt to tax the property of the Federal Government engaged in activities which are not "necessary adjuncts" to the existence of the Federal Government, we venture to say that the Department of Justice would be the first to repudiate the doctrine contended for in the Government's brief herein; nor are we left to speculation as to the attitude of the Supreme Court of

the United States if such tax by a State should be attempted.

In the case of Panhandle Oil Co. v. Knox, supra, as hereinbefore observed, the State of Mississippi attempted to tax sales of gasoline to the Federal Government for use by a Veterans' Hospital at Gulfport in that State. It was held that the State had no power to impose such tax because said hospital was an instrumentality of the United States.

If the conduct of a university by a State is proprietary because, as the Government contends, there are many private universities and colleges in the country, then by the same reasoning the conduct of a hospital is proprietary because there are thousands of private hospitals in the country. If hospitals conducted by the Federal Government are immune from taxation by the States, and the Supreme Court has expressly held that they are so exempt, although clearly not necessary to maintain the sovereignty of the Federal Government, we think it must follow that a State institution like the University of Illinois is likewise exempt from the general taxing power of the Federal Government.

We do not think that education has ever been within the domain of private business in the sense that educational activities conducted by a State should be considered as in the same class as sales of liquor by a State, such as involved in South Carolina v. United States, supra, or other business which is ordinarily conducted by private citizens for the purposes of profit.

The case of United States v. Baltimore & Ohio Railroad Company, 17 Wall. 322, involved the question of whether interest payable to the City of Baltimore, upon a loan made by the city to said railroad company as an inducement to said company to make Baltimore its eastern terminus, was exempt from taxation by the Federal Government. The loan was authorized by the Legislature of the State of Maryland.

It was held that such interest was so exempt; in its opinion the court said:

> This advance of the city bonds was not a donation. It was an investment supposed to be judiciously made and adequately secured. It was not for the individual benefit

of those managing the business. No one received advantage except as he was a citizen or his property was within the city. It was not a loan for the benefit of the railroad; it was for the benefit of the city solely. That the railroad company was also benefited did not affect the purpose of the transaction.

If the loaning of money by a city to a railroad company to advance the welfare of all the people of that city was the exercise of such a governmental function as exempted interest thereon paid to the city from taxation by the Federal Government, it would seem clear beyond any doubt that the conduct of education by a State, paid for and controlled by it, is the exercise of a strictly governmental function.

If there were any doubt with respect to this question, we think it has been definitely removed by the case of Burnet v. Coronado Oil and Gas Company, 284 U. S. —, decided since the case at bar was argued before us.

In that case, the State of Oklahoma leased to the Coronado Oil and Gas Company, upon a royalty basis, certain oil lands granted by the Federal Government to that State for the benefit of common schools established by it. The grant provided that such lands might be leased by the State.

The Commissioner of Internal Revenue assessed income and excess-profits taxes upon the lessee's net income arising out of the sale of its portion of the oil produced from said lands. The court held that such income was exempt from taxation upon the ground that the lease in question was an instrumentality of the State for the purpose of carrying out her duty in respect to the public schools.

In its opinion the court said:

When Oklahoma undertook to lease her public lands for the benefit of the public schools she exercised a function strictly governmental in character. Consequently, South Carolina v. United States, 199 U. S. 437, much relied upon, is not in point.

The States are essential parts of the plan adopted by the Federal Constitution; and we accept as settled doctrine that the United States can lay no tax upon their governmental instrumentalities. Texas v. White, 7 Wall. 700,

725; Collector v. Day, 11 Wall. 113; Pollock v. Farmers Loan & Trust Co., 157 U. S. 429, 584; Farmers Bank v. Minnesota, 232 U. S. 516, 527.

While four Justices dissented from the majority opinion in this case, and two dissenting opinions were rendered, none of the Justices dissented upon the ground that the maintenance of common schools by the State was not a strictly governmental function.

It is our opinion that education is a legitimate function of the States, and that the functions performed by the appellant here are strictly governmental in carrying out one of the sovereign powers of the State of Illinois, the exercise of which has never been, and can not now be, regarded as within the domain of the conduct of private business for profit.

The Government relies upon the fact that the University of Illinois is the recipient of Federal appropriations, as well as appropriations from the Treasury of the State of Illinois, for the purpose of carrying on its activities, as establishing that it is not a strictly governmental instrumentality of the State of Illinois. We think the fact that the University of Illinois is the recipient of Federal appropriations, made to the State for educational purposes, emphasizes, rather than otherwise, our view that the University of Illinois is a strictly governmental agency of the State of Illinois. Such appropriations are made in aid and encouragement of education, and it is because of the high public purpose that education serves that it is encouraged by appropriations by the Federal Government.

Neither does the fact that service fees are charged the students, resulting in a substantial revenue to the university, affect its character. Our Postoffice Department is largely supported by charges made for services rendered, but we do not think that any one would contend that, because of that fact, the functions performed by the postal service are not of a strictly governmental character.

The fact that a substantial percentage of the students of the University of Illinois are not residents of the State of Illinois is likewise immaterial. If the State of Illinois desires to give opportunity to residents of other States to enjoy educational facilities afforded and maintained by the State, such fact will not affect the nature of the govern-

mental function of the State providing education of the character here being considered.

It is probably true that a substantial percentage of the students in the public schools of the District of Columbia have parents who are not legal residents of the District of Columbia; but, if that be a fact, it would not affect the strictly governmental character of the functions performed by the schools of the District.

Neither do we think the fact that the University of Illinois is the recipient of certain comparatively small endowments affects its governmental character. We know of no reason why a State, if it sees fit, may not accept gifts to aid it in carrying on either absolutely necessary or other legitimate functions, and the acceptance of such gifts can not affect the character of the functions performed by the State.

While the Government makes some attempt to differentiate between elementary and higher education in the determination of whether the University of Illinois is an instrumentality of the State of Illinois performing strictly governmental functions, we think no such distinction can be made. We may take judicial notice of the fact that there are thousands of private elementary schools in the United States. One great religious denomination provides schools which are under its control for the education of the children of adherents to that faith. Other religious denominations to a lesser extent do likewise. According to the Government's theory, if an institution of higher learning be proprietary because there are many universities and colleges conducted under private auspices, then by the same reasoning all of the public schools of the country are proprietary, and the Federal Government may tax the income of every public school teacher in the land. If a tax by a State upon the sale of gasoline for use in a Federal hospital be invalid, would a direct tax imposed by the Federal Government, apportioned among the States, levied upon the lands and buildings used for school purposes, owned by the State or its subdivisions, be sustained as a valid exercise of the Federal taxing power? We do not think that anyone would seriously contend that such a tax would be valid, and we are unable to see any distinction, so far as the general taxing power of the Federal Government is concerned, between taxing such school buildings and taxing the property of the

State of Illinois held in trust for it by appellant, and used for educational purposes as required by the laws of the State of Illinois.

Furthermore, as bearing upon the interest of a State in education, it is well established that it is within the police powers of a State to compel the attendance of children between certain ages at some school, though it has no right to compel such attendance at a public school. Pierce v. Society of Sisters, 268 U. S. 510. In that case the court said:

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

With these broad police powers over education, it seems to us that it necessarily follows that, where the State itself deems it necessary or desirable for its welfare to provide schools at public expense in order that opportunity may be afforded for the education of children of the State, the exercise of such power by a State or its legally authorized subdivision is a strictly governmental function, and the conduct of an institution of higher learning by a State, or under an agency created and controlled by the State, is likewise a strictly governmental function.

Without pursuing this branch of the case further, we are of the opinion that appellant is an agency of the State of Illinois engaged in the performance of governmental functions which are immune from the general taxing power of the Federal Government under clause 1, sec. 8, Article I of the Constitution of the United States.

It is suggested that, even though appellant is immune from the general taxing power of the Federal Government under said clause, such immunity should not extend to import duties such as those here involved, upon the theory that while immunity from direct and excise taxes was reserved to the States, there was no such reservation as to the exaction of import duties. It is suggested that, inasmuch as the States retained their power to levy direct and excise

taxes, concurrently with the Federal Government, and surrendered in the Federal Constitution the right to levy import duties and granted to the Federal Government the sole power to levy such duties, it should be implied from these facts that the States, by virtue of their surrender of the power to levy import duties, surrendered their immunity from taxation through import duties levied by the Federal Government.

We cannot agree that any such implication arises from the surrender by the States of the right to levy import duties. We see no reason why the surrender of one right theretofore possessed should be construed as the surrender of another and different right possessed by the States. The right surrendered was the right possessed by the States to levy import duties. Another right possessed by the States was the immunity of governmental agencies of the States from Federal taxation. Why should it be held that a State may be taxed for the support of the Federal Government if the tax levied comes under the term of an import duty, but that it may not be taxed if it comes under the term of an excise tax?

In either case, a State in its sovereign capacity is called upon to contribute, out of its treasury, to the support of the Federal Government, and the tax is laid upon property of the State employed in the performance of essential governmental functions of the State.

We find no warrant, either in the Constitution or a decision of any court, for the segregation of import duties from direct and excise taxes, or for holding that the States are immune from one form of taxes named in the Constitution but not from another also therein named.

That an import duty under the clause of the Constitution here under consideration is a tax cannot be questioned; we can find no case where it has been questioned since the decision in Brown v. Maryland, 12 Wheat. 419, wherein Chief Justice Marshall said: "A duty on imports is a tax on the article paid by the consumer." The following is found in the decision of this court in United States v. Shallus, 9 Ct. Cust. Appls. 168, 171, 36 T. D. 391: "The definition of a duty is 'a tax on imposts; excise or customs dues'."

An action for debt will lie against an importer to recover duties upon goods imported. Stockwell v. United

States, 13 Wall. 531. To the same effect is Meredith v. United States, 13 Pet. 486.

If, therefore, an import duty is a tax, and if there be in the Constitution an implied exemption of the States from taxation by the Federal Government, insofar as their essential governmental functions are concerned, we are unable to perceive upon what theory the import duties here involved may be sustained, holding as we do that the University of Illinois is an instrumentality of the State of Illinois performing an essential governmental function of that State.

The majority opinion of the court below, as heretofore stated, assumed that the University of Illinois was an instrumentality of the State of Illinois engaged in the performance of a governmental function, but overruled the protests upon the ground that the payment of import duties by the appellant would not destroy the University of Illinois or noticeably impair its efficiency. In concluding said majority opinion it was said:

The plaintiff failed to show that the University would be destroyed if it were prevented from importing merchandise, and, indeed, probably could not make such a showing. The University expends yearly about five millions of dollars. Of this amount probably not to exceed five thousand dollars are spent for merchandise produced in foreign countries, or one one-hundredth of 1 per cent. It surely will not be seriously contended that to close the door to such importations would destroy the institution, or noticeably impair its efficiency.

The lower court, in arriving at its conclusion, relied especially upon the cases of Metcalf & Eddy v. Mitchell, supra, Willcuts v. Bunn, supra, and Educational Films Corp. of America v. Ward, 282 U. S. 379. It quoted from the first of these cases as follows:

In such a situation it can not be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way. * * * we do not find that it impairs in any substantial manner the ability of plaintiffs in error to discharge their obligations to the

State or the ability of a State or its subdivisions to procure the services of private individuals to aid them in their undertakings. Cf. Central Pacific Railroad v. California, 162 U. S. 91, 126. We therefore conclude that the tax in No. 183 was properly assessed.

It also quoted from Willcuts v. Bunn, supra, as follows:

Before the power of the Congress to lay the excise tax in question can be denied in the view that it imposed a burden upon the States' borrowing power, it must appear that the burden is real, not imaginary; substantial, not negligible.

It also quoted from Educational Films Corp. of America v. Ward, supra, as follows:

This court, in drawing the line which defines the limits of the powers and immunities of State and National Governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same State. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the constitution, without undue interference by the other.

It is clear that the lower court failed to distinguish between a tax levied by the Federal Government directly upon a State or upon one of its instrumentalities performing only an essential governmental function, and a tax laid upon an individual or corporation engaged in private business, performing as a part of its business some governmental function. In each of the cases relied upon by the lower court, the taxpayer was engaged in business for profit, and was an instrumentality of government only in an incidental way. In none of said cases was the tax levied upon and paid by the State or one of its instrumentalities performing only essential governmental functions.

In the quotation relied upon by the lower court from the decision in Metcalf & Eddy v. Mitchell, supra, it was said:

In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense.

In the case at bar the tax is imposed directly upon an agency of government "in a technical sense," and is paid directly out of the State Treasury.

In the case of Willcuts v. Bunn, supra, it was held in effect that, even though the tax was not imposed directly upon an agency of government, nevertheless if the tax imposed a burden upon the States' borrowing power, and was real and not imaginary, substantial and not negligible, it could not be upheld. In the case at bar the burden is real, not imaginary, because directly imposed upon an agency of government, and actually paid by the State of Illinois.

We think the rule is well established that, where a tax is imposed directly by the Federal Government upon an agency of a State engaged wholly in the performance of an essential governmental function, such tax is invalid, and where the instrumentality is of this class, exemption does not depend upon the degree of burden. Gillespie v. Oklahoma, 257 U. S. 501; Metcalf & Eddy v. Mitchell, supra.

Evidently the lower court overlooked the principle last above stated, and that principle is founded upon an absolute want of power in the Federal Government to tax an instrumentality of a State engaged wholly in the performance of an essential governmental function. If there be want of power to levy a tax, the fact that the burden sought to be imposed is small is utterly irrelevant to the question of the validity of the tax.

In the case of Johnson v. Maryland, 254 U. S. 51, 55-56, the court said:

* * * With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since McCulloch v. Maryland, 4 Wheat. 316. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the States to touch, in that way at least, the instrumentalities of the United States; 4 Wheat. 429, 430; and that is the law today. Farmers & Mechanics Savings Bank v. Minnesota, 232 U. S. 516, 525, 526. * * *

Of course, as heretofore shown, the same rule applies to the immunity of the States from Federal taxation as in the

case of the immunity of the Federal Government from taxation by the States.

In Indian Motocycle Co. v. United States, supra, the court said:

It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. Collector v. Day, 11 Wall. 113, 125, 127; Willcuts v. Bunn, 282 U. S. 216, 224-225. *Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute.* McCulloch v. Maryland, 4 Wheat. 316, 430; United States v. Baltimore & Ohio R. Co., 17 Wall. 322, 327; Johnson v. Maryland, 254 U. S. 51, 55-56; Gillespie v. Oklahoma, 257 U. S. 501, 505; Crandall v. Nevada, 6 Wall. 35, 44-46. (Italics ours.)

In our opinion, the foregoing authorities establish that, in a case like that at bar, the amount of the tax imposed, or whether its imposition would substantially interfere with or embarrass the State of Illinois, is wholly immaterial because, as stated in the last case cited, the exemption is absolute in the class of cases of which this is one.

The Government further contends that the regulation of foreign commerce is a plenary power conferred upon the Federal Government, and that the right to tax follows the right to regulate.

We cannot agree with the statement that the right to tax follows the right to regulate foreign commerce. Each are separate and independent powers, although contained in the same section of Article I of the Constitution. Government counsel have cited no cases in support of their contention that the right to tax imports follows the right to regulate foreign commerce, and we have found none.

We are clear that no grant of power can be implied from the commerce clause of the Federal Constitution that would

impair or destroy a right impliedly secured by other parts of the Constitution. That is to say, the immunity of the States from Federal taxation was not destroyed by the grant to the Federal Government of the right to regulate foreign commerce.

In the case of Adair v. United States, 208 U. S. 161, the court said:

* * * We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. Gibbons v. Ogden, 9 Wheat. 1, 196; Lottery Case, 188 U. S. 321, 353.

It is without doubt true that, where the power of taxation exists, it may be used as a means of regulating commerce. Indeed, said clause 1, sec. 8, Article I, expressly provides that Congress shall have power to lay taxes, duties and imposts to provide for the general welfare of the United States.

In the case of Hampton & Company v. United States, 276 U. S. 394, affirming upon review a decision of this court (14 Ct. Cust. Appls. 350, T. D. 42030), involving certain provisions of the Tariff Act of 1922, the Supreme Court, speaking through Chief Justice Taft, said:

So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes can not invalidate Congressional action. As we said in the Child Labor Tax Case, 259 U. S. 20, 38: "Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them, and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive." And so here, the fact that Congress declares that one of its motives in fixing the rates of duty is so to fix them that they shall encourage the industries of this country in the competition with producers in other countries in the sale of goods in this country, can not invalidate a revenue act so framed. * * *

It is our opinion that the commerce clause of the Constitution neither expressly nor by implication confers upon Congress any power to levy taxes upon any object otherwise immune from taxation. Therefore, if the States are immune from taxation by the Federal Government under clause 1, sec. 8, Article I of the Constitution, as they are in so far as they perform essential governmental functions, the grant of power in clause 3 of said section 8 does not affect such immunity, and the commerce clause of the Constitution may not be resorted to for the purpose of levying import duties upon the State in so far as they are engaged in the performance of essential governmental functions.

The Government makes two other contentions upon this branch of the case. The first is that there has been a legislative and administrative construction of the Constitution which warrants us in holding that the University of Illinois is not exempt from the imposition of duties levied upon merchandise imported by it to be used for educational purposes.

There is no proof in the record of any administrative construction or practice, and the only legislative construction relied upon is the fact that since 1897 the tariff acts have provided for free entry of certain merchandise imported by States, etc. for exhibition purposes, and the further fact that, from 1790 to 1862, scientific and philosophical apparatus was given free entry in the various tariff acts, and that since 1862 such merchandise has been at times dutiable and at other times free.

With respect to the provision for free entry of certain merchandise by States for exhibition purposes, we would observe that this was first provided for in the Tariff Act of 1897, and many years before that time, as we have shown, the Supreme Court of the United States had decided that the Federal Government had no power to impose taxes upon the States or their instrumentalities in so far as they were engaged in the performance of essential governmental functions. Obviously, a provision in a tariff law that under certain conditions free entry of merchandise should be accorded to the States cannot give rise to any implication that, otherwise, merchandise imported by States is subject to duty, when, long before the enactment of such law, it has in principle been determined by the Supreme Court of the United States that, under the

Constitution, Congress is without power to levy such a tax.

With regard to the Government's suggestion respecting the treatment of scientific and philosophical instruments in various tariff acts, we fail to see any relevancy whatever in such fact. It is not contended that Congress ever specified that such instruments, when imported by States or their instrumentalities, should be dutiable or free in the various tariff acts, but merely that such instruments generally should be free or dutiable.

The Government also points out that the Federal Government pays duties upon all merchandise imported for its own use, and it is argued that therefore it should be implied that it has a right to exact duties upon merchandise imported by the States for governmental purposes. Of course, the United States does not actually pay duties upon merchandise imported for its own use, except in form. What is paid out from the Treasury in the form of duties is immediately turned back to the Treasury in the form of revenue. When the transaction is completed, the Government is not poorer by one dollar, except that it has paid something in the way of expenses for the gesture of collecting money from itself. Of course it is done merely as a convenient means of bookkeeping and supervision of appropriations. It can have no bearing upon the question before us. Because a man may choose to transfer money from one pocket to another does not indicate that he has a right to reach into another man's pocket and transfer money he finds there to his own.

We now proceed to the next major contention of the Government, viz. that under the power to regulate commerce the importation of merchandise is a privilege, not a right, and Congress may lawfully exact, as a condition of the exercise of such privilege, the payment of the duties here in question.

If the paragraphs of the Tariff Act of 1922 here under consideration purported to be, or were in fact, primarily regulations of commerce, the question raised by the Government upon this branch of the case would be pertinent; but the duties provided under the various paragraphs of said act here involved do not purport to be, nor are they, in fact, primarily regulations of commerce. It is true that the title of the act declares it to be "An Act To Provide Revenue, to Regulate Commerce with Foreign Countries,

to Encourage the Industries of the United States, and for Other Purposes," and it is undeniably true that there are provisions of the act which depend for their validity upon the commerce clause of the Constitution. Section 305 is of this character, which prohibits the importation of the articles therein named; but the dutiable paragraphs of the act are primarily for revenue, and while commerce may also be incidentally regulated by the imposition of the duties provided for, the validity of their imposition must rest upon the taxing power granted by said clause 1, sec. 8, Article I of the Constitution.

Though not expressly stated, this is clearly implied in that part of the opinion of Chief Justice Taft in the case of Hampton & Company v. United States, supra, hereinbefore quoted. We repeat and italicise the first part of said quotation:

So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes can not invalidate Congressional action. * * *

In none of the paragraphs of said Tariff Act of 1922 fixing duties is there any indication that the primary purpose of the duties therein provided was not to raise revenue for the benefit of the general government.

If the contention of the Government, that the validity of the duties involved herein is not dependent upon the taxing power of Congress, but may be sustained under its power to regulate commerce, be valid, then it must follow that such duties are not governed by that part of said clause 1 which provides that "all duties, imposts and excises shall be uniform throughout the United States." It likewise would follow that, if the Government's contention be correct, none of the dutiable paragraphs of said tariff act are subject to said uniformity clause, for it may be contended with equal reason that all of them are regulations of commerce and do not depend for their validity upon the taxing power of Congress.

It has been established that regulations under the commerce clause are not controlled by the uniformity clause of said clause 1, sec. 8, Article I of the Constitution. Cooley v.

Board of Wardens of Port of Philadelphia, 12 How. 298; Alaska v. Troy, 258 U. S. 101.

However, it is unnecessary to pursue this discussion further because it has been established by the Supreme Court of the United States that the act of laying import duties is an exercise of the taxing power of Congress and not of the power to regulate commerce.

In the leading case of Gibbons v. Ogden, 9 Wheat. 1, 199, the court, speaking through Chief Justice Marshall, said:

> We must first determine, whether the act of laying "duties or imposts on imports or exports," is considered, in the constitution, as a branch of the taxing power, or of the power to regulate commerce. We think it very clear, that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section: "Congress shall have power to lay and collect taxes, duties, imposts and excises"; and before commerce is mentioned, the rule by which the exercise of this power must be governed, is declared. It is, that all duties, imposts and excises shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred. The constitution, then, considers these powers as substantive, and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. * * *

In the State Tonnage Tax Cases, 12 Wall. 204, the court, after citing Gibbons v. Ogden, supra, said:

> Whether the act of laying and collecting taxes, duties, imposts, and excises was a branch of the taxing power or of the power to regulate commerce, was directly under consideration in the case last cited, and it was conclusively settled that the exercise of such a power must be classed with the power to levy taxes. Had the Constitution, therefore, contained no prohibition, it is quite clear that it would have been competent for the States to levy duties on imports, exports, or tonnage, as they had done under the Confederation.

It has been suggested that the case of Russell v. Williams, 16 Otto 623, is contrary to the views expressed in the cases last above cited, but we are not of that opinion. That case involved the question of whether an Act of Congress imposing an additional duty of ten per centum ad valorem upon goods produced in countries east of the Cape of Good Hope, when imported from places west of the Cape of Good Hope, was impliedly repealed by a subsequent Act of Congress. The court held that it was not for the reason that said ten per centum additional duty was "intended as a general regulation of commerce." There was not involved the question of whether said ten per centum additional duty was a lawful exercise of the taxing power of Congress. It apparently was conceded that it was such; but the court found that it was intended also as a regulation of commerce. So construed, the decision is in harmony with Gibbons v. Ogden, supra, and the State Tonnage Tax Cases, supra, and is in harmony with the opinion of the Supreme Court in Hampton & Company v. United States, supra. The effect of the court's decision in Russell v. Williams, supra, is simply that, inasmuch as the act there under consideration, levying additional duties, had the incidental purpose of a regulation of commerce, it was not repealed by a subsequent act changing the ordinary rate of duties upon goods to which the additional duties applied.

This, we think, is made plain from that part of the opinion which states, after citing the case of Sturges v. The Collector, 12 Wall. 19, which involved the construction of the same Act of Congress as the court was there considering:

* * * The court, speaking through Mr. Justice Clifford, referred to the evident purpose of Congress, *not only to augment the revenue,* but to make a discrimination "in favor of the direct trade." * * * (Italics ours.)

Immediately following the language above quoted, the court said: "In conformity with the principle of these decisions, * * *," thereby clearly indicating the court's approval of the view expressed in Sturges v. The Collector, supra, that the purpose of Congress in providing the additional duty was to augment the revenue and hence the duty rested upon the taxing power of Congress, and, in addition, as an incident thereto, had the purpose of a regulation of commerce.

We would observe further, in this connection, that if said ten per centum additional duty involved in the case last cited could be considered as a regulation of commerce only, such additional duty would not be subject to the uniformity clause of said clause 1, sec. 8, Article I of the Constitution, and one rate of additional duty might have been made if importations of the character there being considered were entered at the Port of San Francisco, and a different rate of additional duty if entered at the Port of New York. We think no one would contend that such a law could be sustained as a regulation of commerce, separate and apart from the power to lay duties. Clearly, an additional duty that also serves as a regulation of commerce would be subject to the requirement of uniformity and, even though it was effective as a regulation of commerce and might be so considered for certain purposes, its validity must rest upon the taxing power of Congress and not upon the power to regulate commerce.

In the case at bar, as we have heretofore indicated, Congress had no power to levy the duties here in question under the taxing power granted by the Constitution, and it is our view, sustained by the cases hereinbefore cited, that an import duty cannot be sustained as a regulation of commerce alone when there is a want of power to tax the goods upon which the duty is laid for the purposes of revenue.

As it is our conclusion that the paragraphs of said Tariff Act of 1922 here involved do not constitute primarily regulations of commerce, but are an attempted exercise of the taxing power of Congress, it is unnecessary for us to consider the question of whether Congress has the power under the commerce clause of the Constitution arbitrarily to prohibit the importation of the merchandise here involved. Much of the argument in this case has been devoted to this question, the Government contending for, and the appellant denying, the existence of such power.

We may, for the purposes of this case, admit the Government's contention that the Government may arbitrarily place an embargo upon the importation of any goods, and that, as an incident of such power, it may conditionally permit the importation upon which it has a right to place an embargo. We repeat that there is nothing in the dutiable paragraphs of the Tariff Act of 1922 which indicates a purpose of Congress to impose duties primarily for the purpose

of regulation, but on the contrary it is clear that the primary purpose of the enactment of the dutiable paragraphs was to raise revenue, under the taxing clause of the Constitution.

For this reason, we consider that the question of the right of the Government arbitrarily to place an embargo upon merchandise of the character here involved is irrelevant to the determination of the question of the validity of the duties assessed upon the goods here involved.

The questions here considered are of the highest importance; there are involved the respective rights of the Federal Government and the States with respect to the immunity from taxation of the States by the Federal Government upon the one hand, and the immunity of the Federal Government from taxation by the States upon the other.

While it may be conceded that the conclusion we have reached may conceivably result in depriving the Federal Government of considerable revenue, it is also true that, if certain contentions of the Government were correct, a substantial part of the activities of the Federal Government would be subject to taxation by the States.

We think the conclusion we have reached is in harmony with the decisions of the Supreme Court of the United States, and is necessary if the respective sovereign rights of the States and the Federal Government are to be preserved.

In our opinion, for the reasons stated, the judgment of the United States Customs Court should be reversed and the cause remanded with directions to sustain the protests.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Monday, June 20, 1932.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 20th day of June, A. D., 1932.

Present: The Honorable William J. Graham, Presiding Judge, and the Honorables Oscar E. Bland and Finis J. Garrett, Associate Judges.

The court was opened for business in due form.

* * * * * * *

Customs Appeal No. 3441

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Appellant,

v.

THE UNITED STATES, Appellee

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

Ordered that the judgment of the United States Customs Court be, and the same is hereby, affirmed.

* * * * * * *

(Signed) William J. Graham, Presiding Judge.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

DOCKET ENTRIES

June 24, 1932.—Motion by appellant for extension of time in which to file petition for rehearing.

June 28, 1932.—Above motion approved and time extended to August 1, 1932.

July 22, 1932.—15 copies appellant's petition for rehearing filed.

July 28, 1932.—15 copies appellee's opposition to rehearing filed.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Monday, October 10, 1932.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 10th day of October, A. D., 1932.

Present: The Honorable William J. Graham, Presiding Judge, and the Honorables Oscar E. Bland, Charles S. Hatfield, Finis J. Garrett, and Irvine L. Lenroot, Associate Judges.

The court was opened for business in due form.

* * * * * * *

Customs Appeal No. 3441

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS,
Appellant,

v.

THE UNITED STATES, Appellee

Appellant having heretofore filed petition for rehearing herein, it is—

Ordered that said petition be, and the same is hereby, denied.

* * * * * * *

(Signed) William J. Graham, Presiding Judge.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

DOCKET ENTRIES

October 15, 1932.—Petition of appellant to stay final mandate pending application for writ of certiorari to the Supreme Court, filed.

October 17, 1932.—Above petition approved by Presiding Judge.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Customs Appeal No. 3441

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS,
Appellant,

v.

THE UNITED STATES, Appellee

CERTIFICATE OF CLERK

I, Arthur B. Shelton, Clerk of the United States Court of Customs and Patent Appeals, do hereby certify that the

attached pages, numbered 1 to 165, inclusive, constitute a true and complete transcript of the record and certain proceedings had in said court in the above-entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this twenty-first day of October, A. D., 1932.

Arthur B. Shelton, Clerk. [Seal of the United States Court of Customs and Patent Appeals.]

[fol. 152] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 9, 1933

The petition herein for a writ of certiorari to the United States Court of Customs and Patent Appeals is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 153] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF RECORD FOR USE ON HEARING OF WRIT OF CERTIORARI—Filed Jan. 12, 1933

It is hereby stipulated by and between counsel for the parties to the above-entitled cause that, in order to eliminate portions of the record unnecessary for consideration upon the hearing of the writ of certiorari granted in this cause and in order to reduce the cost of printing the record, the clerk in printing the record may eliminate the following portions of the printed record filed in connection with the submission of the petition for certiorari:

1. State statutes relating to University of Illinois. (R. 15-31.)
2. Drafts on State Treasurer, etc. (R. 50A-50E.)
3. Material at R. 51-60, consisting principally of colloquy between court and counsel relating to proof of State statutes and decisions.

[fol. 154] 4. Testimony of Lloyd Morey commencing with the fourth question on R. 60, relating to State court decisions affecting the University of Illinois and ending with the statement of Justice Young at the top of R. 63 reserving decision upon an objection to the admission in evidence of the report of a certain State court decision.

5. Additional testimony of Lloyd Morey relating to certain changes in the charter of the University of Illinois, beginning with the fourth question on R. 78 and ending with the following statement of Mr. Johnson on R. 79, "All right. That is all;" etc.

6. Requests for time to file briefs. (R. 80.)

7. Colloquy between court and counsel relating to certain customs protests not involved in the instant case. (R. 81-85.)

Sveinbjorn Johnson, Counsel for Petitioner. Thomas D. Thacher, Solicitor General.

January 10th, 1933.

[fol. 155] [File endorsement omitted.]

Endorsed on cover: File No. 37,235. U. S. Court of Customs and Patent Appeals. Term No. 538. Board of Trustees of the University of Illinois, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed December 6, 1932. File No. 37,235.